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# SANCTIONS AND TREATY ENFORCEMENT

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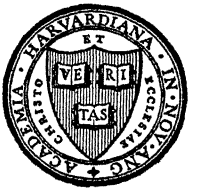


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TO MY MOTHER AND FATHER

# FOREWORD

To one who surveys international relations of the first quarter of the twentieth century, it would be evident that there is no scarcity of treaties. Indeed the United States has signed more than four hundred international agreements during this period and many of these have been multilateral, thus involving a much larger number of states than four hundred. When a survey of all the treaties negotiated by the states of the world since 1900 is made, the total network seems to be sufficient to maintain orderly relations among these states if the treaties are observed. Many of these treaties, as is true of those of earlier centuries, were made with a view to establishing the *status quo* while at the same time understood to be subject to the doctrine of *rebus sic stantibus*, and often there were expressed or implied provisions for perpetuity in the application of the terms of the agreement. The failure of one or more of the parties to observe articles of treaties has been so common as to shake the confidence in treaties. Such articles have, however, sometimes embodied impossible or impracticable provisions and often preambles have misled by stating purposes quite out of accord with provisions agreed upon in the treaty.

The doctrine that treaties are to be observed has received lip service for centuries, but history again and again shows that when policy and the provisions of the treaty are not in accord, policy has prevailed. The disturbing effect of some of these uncertainties have been in part met by provisions for periodic revision or reconsideration of international engagements. A bilateral treaty, made as binding two parties only, from its very nature often implies that other states are not in accord with the prescriptions of the treaty. Manifestly also, treaty agreements are entered into in order that the relations between the parties may be more definitely determined. If, however, these agreements may be set aside at will by a party to the treaty, little of the hoped for advantage is gained. The early practice of invoking the support of deity or other solemn procedures has not proven a sufficiently reliable support for international agreements. If a treaty is of such a nature as would be subject to no strain, there might be little or no reason for its existence and the observance of its terms would be usual. If the observance of a treaty involves great sacrifice on the

part of one state with little or no commensurate advantage to that state, there will be a continuing pressure to disregard its provisions which, under special circumstances, may be more than the state under the obligation can withstand.

The Ten Commandments contained statements of inducements to do or to refrain from doing acts. These were of the nature of sanctions. Since that time human action seems to a considerable extent to have been influenced by sanctions and one of the most difficult problems in social as well as in international relations has been to adapt the sanction to the situation concerned.

Dr. Wild has made an attempt to bring the idea of sanctions into an understandable relation to treaty enforcement. He would not regard what he has said as the last word upon this difficult and involved subject, but to it he has made a valuable and constructive contribution.

GEORGE GRAFTON WILSON

March 2, 1934

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# PREFACE

The idea for a study of treaty sanctions was suggested to me by Professor George Grafton Wilson of Harvard University to whom I am very deeply indebted for encouragement and counsel. To Professors Rupert Emerson, A. N. Holcombe and C. J. Friedrich, also of Harvard University, who read the manuscript and whose recommendation made possible the publication of this volume with the assistance of the Louis Adams Frothingham Fund, my thanks are many and lasting. Though indispensable as aids in this project, no one of the above, of course, is to be held accountable for conclusions reached, and each is entitled to the customary absolution from responsibility for opinions expressed or mistakes committed. Any sins and errors are strictly my own. Most particularly, I wish to thank my wife whose feats in copying almost illegible manuscript and in putting it into order during the hot days of a very hot summer immeasurably speeded the work of preparation for the printer.

This book is by no means intended to be an exhaustive treatment of the topic of sanctions. Emphasis is placed mainly upon treaty sanctions and their practicability, while questions as to the mode and difficulty of applying particular sanctions and the significance of sanctions in the philosophy of international law are but lightly touched upon. Many aspects of the complex question of sanctions are thus omitted from this volume which is launched into being with the hope that it may be of service in the study of sanctions by those interested in that formidable problem, the enforcement of international law.

P.S.W., Jr.

John Winthrop House,
Harvard University,
Cambridge, Massachusetts,
February, 1934

## ABBREVIATIONS

*Acad. de Dr. Int., Rec. des Cours: Academie de Droit International, Recueil des Cours.*
*A. J. I. L.: American Journal of International Law.*
*Am. Pol. Sci. Rev.: American Political Science Review.*
*R. D. I.: Revue de Droit International et de Legislation Comparée.*
*Rev. Gen. de Dr. Int. Public: Revue Général de Droit International Public.*

# SANCTIONS AND TREATY ENFORCEMENT

# CHAPTER I

## SANCTIONS, SANCTITY, AND REVISION

The framework of the international political and legal structure is to a very large extent determined and fixed by treaties which are employed by states for the formulation of their mutual obligations. The "contracts," the "laws", the "constitutions" and the "charters" essential to the world of states are today, more than ever, drawn up in treaty form. A breach in the treaty edifice may therefore constitute a threat to international order. At the least, a treaty violation may disrupt the good relations between two states. The enforcement of treaties is therefore a problem of general concern and as sanctions are the means of inducing the observance of an obligation, treaty sanctions—the means whereby the keeping of international engagements may be made more certain[1]—are important for an international society interested in the preservation of order and of respect for solemn covenants.

These sanctions have been and are of many types, and several of them are of very long historical standing, for a treaty has "always had an implied, if not a stated sanction behind it. Whenever one party to a treaty failed to live up to its word, the other party has usually tried to enforce the bargain, using means which ranged from the severing of diplomatic relations, through the refusal of economic intercourse, to the extreme means of war'."[2] Fundamentally, treaty sanctions are of two sorts: those like the ones just mentioned which are the sanctions available for all international law, the rule that treaties are inviolable being part of the customary law of nations, and those which are inherent in and specifically contained in treaties themselves. It is this latter variety, the type peculiar to treaties, which will be of chief concern in this volume.

Since a treaty serves as the instrument for establishing almost any variety of legal obligation which states have found desirable to create, the world's net-work of conventional agreements is complex in the extreme, extending from a simple bi-partite treaty at one end to a multi-partite agreement like the Covenant of the League of Nations or the Pact of Paris at the other. Whereas the domestic

[1] For an analysis of this definition see later discussion beginning p. 57.

[2] Mitrany, D., *The Problem of International Sanctions*, pp. 23–24.

community has at its disposal a number of instruments, laws, charters, contracts, and the like, in which to establish legal relationships, the international community on the other hand has such a paucity of forms available that obligations of many sorts must be compressed into the common treaty mould. The treaty picture is therefore confused, theoretically, according to law, to be viewed in one dimension with treaties of peace standing on the same plane as automobile and travel conventions, but practically regarded with a second dimension, the political one, which thrusts some treaties like the Covenant of the League into the foreground, and pushes agreements of minor significance into the recesses. Within the state the organization of government has superimposed its will upon that of individuals, and a hierarchy of agreements has been evolved, ranging from a constitution to private contracts; a system of legal precedence has been evolved. But internationally, no agency exists to supervise the treaty making powers of the members of the community or to evaluate the results of their bargainings with one another. Each state is the center of a web of treaty obligations, the legal threads reaching out to mingle with those from other centers, and the lines crossing and interweaving in a bewildering fashion. An omnivident eye regarding this welter of treaty strands would note that some were very short, spanning the distance between two centers only, while others linked together almost all of them. Bi-partite, regional, and world pacts co-exist, side by side, and their strands from the legal point of view are on a plane of equality, there being no international political body to pull apart the skein and decree which threads have priority.

As long as the treaty pattern is thus disordered, the question of treaty sanctions will be complicated also. Since all treaties in some degree bring a measure of order into international life, the enforcement and observance of treaties is vital to the welfare and harmony of states, but since the scope and purpose of some treaties are far broader than those of others, the sanctions of these agreements of great political and legal moment are designed with an aim beyond mere treaty enforcement as such; they are intended to maintain a situation or condition established by the treaty, and thus are part and parcel of the problem of establishing peace and security. Because it is in treaties that fundamental and world-wide obligations are established, the sanctions of such treaties operate to provide world order as well as simple treaty enforcement. Article 16 of the Covenant of the League not only contains treaty sanctions; it is also in-

tended to furnish police measures for the community. Treaty sanctions therefore involve not merely the observance of covenants between two parties, but also the maintenance of a "constitutional" arrangement among states. Not only are some treaties and their sanctions of more significance for the world at large than are others, but conventions may sometimes have no other aim than to provide sanctions for another agreement regarded as of high concern; the proposed "Consultative Pact," for example, would furnish a sanction for the Pact of Paris. Due to the absence of an international legislature and a highly developed international administrative body, states have no recourse but to agree individually through the medium of treaties for the establishment of sanctions deemed essential for the upholding of convenants, and of arrangements brought into being by those covenants. Treaties may thus support and supplement one another, with some treaties supplying sanctions for others, and with the general sanctions of international law always at hand to bolster the jerry-built treaty structure.

Definition and analysis of the term sanction will be taken up later, but here at the outset certain problems relating to treaties and treaty sanctions arise for immediate consideration. As sketched above, the world's treaty relations create a jumble of international obligations, some bi-partite, other multi-partite, some relating to matters of relatively minor interest, others concerning issues of the highest consequence. Some are the result of wars, and were "forced" (not legally) upon certain members of the community; others are the product of a mutual and equal desire to further certain common ends. An individualistic society of states has inevitably created a treaty edifice which lacks symmetry and coherence, and which necessarily contains many paradoxes and inconsistencies. Some of the treaties attempt to remedy the confusion by supplying rules and regulations for the governance of international society, and their sanctions therefore tend to enforce order, but before the treaty relations can be satisfactorily arranged, two questions must be approached, (1) that of treaty revision and termination, and (2) that of evaluation, that is, the creation of some system of legal precedence whereby treaty obligations may be set into their relative order. These two problems doubtless merge into one, and in intra-state affairs are solved by having governmental agencies which make new laws, repeal old ones, and declare certain engagements or rules void and of no effect. Naturally, a world government would resolve these matters, and would be the ultimate solution, but

leaving Utopianism aside, some progress is being and can be made toward a settlement, even with the rudimentary international organization now existence.

These questions are of vital concern to the topic of treaty sanctions. Sanctions make for enforcement, but if treaties conflict with one another, or if there is doubt that a given treaty *should* be enforced, sanctions not only may operate at cross purposes, but may also work for the enforcement of treaties which need revision, or which establish a status quo regarded by one or more of the contractants, as "inequitable." One of the chief reasons why sanctions (to enforce treaties and thereby maintain a desired status quo) have so often encountered hostility and suspicion, has been the fear that they would tend to freeze a status quo into a rigid mould, with no corresponding "thawing process" being provided. The doctrine that treaties are sacred is elemental in international law, but the latter has been deficient in elaborating means for the annulment or revision of treaties which no longer should be kept in vigor.

The law and the practise of states have evolved some principles in regard to treaty termination, though rather vaguely as yet, and the establishment of the League of Nations, the Permanent Court of International Justice, and of other international bodies has provided new channels, not only for revision, but for the evaluation of treaties, that is, examination of conventions to see if they conform to the law and to the "constitutional" framework of the community, and for the pacific settlement of disputes arising out of treaty interpretation, execution and enforcement. If these new international bodies can help to systematize the world's conglomeration of treaties by regarding certain convenants as fundamental, and by declaring invalid, or in need of revision, engagements contrary thereto, and if they can supply the mechanism whereby treaties which need overhauling may be brought up for reconsideration, the problem of sanctions will be simplified: sanctions would then support the basic treaties establishing those agencies which would both enforce the agreements and look to their revision, bringing all other treaties and international organizations into line with the constitutional arrangement. Already a sense of what, for a better term, may be called "constitutionalism," is creeping into international relations.[3]

[3] Article 20 of the Covenant envisages the possibility of a treaty's being incompatible with the provisions of the Covenant and stipulates that:

"1. The Members of the League severally agree that this Covenant is ac-

Various factors thus combine to obviate the difficulties caused by a rule of treaty sanctity which, if unmitigated, would make for an impossibly rigid treaty structure, and which even as modified today, hinders the development of stronger treaty sanctions. These factors are: (1) tendencies in the law of nations itself, (2) the practise of states in treaty making, (3) the creation of international agencies to revise treaties, to supervise treaty making and provide the machinery for the pacific settlement of disputes. Amicable adjustment of difficulties arising out of the application of treaties is a corrollary of sanctions; arbitration and sanctions necessarily go together.[4] The problem of sanctions, therefore, is a legal and political one: legal in that sanctions relate to treaties and are designed to enforce legal

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cepted as abrogating all obligations or understandings inter se which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.

"2. In case any Member of the League shall, before becoming a Member of the League, have undertaken any obligation inconsistent with the terms of this Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations."

The article, however, does not state that treaties inconsistent with the Covenant's terms are ipso facto null. Apparently, if states do not take steps to release themselves from treaty obligations which are incompatible with the Covenant (who is to be the judge in such a case?), such obligations are still binding as between the contractants, and no powers under the article are given to the League to bring about the termination of treaty commitments of this character. Efforts to give the League authority to pass judgment upon treaties have most often been suggested in connection with Article 18, the treaty registration article. Some of these suggestions have been designed to supply sanctions to the Pact of Paris and the Covenant (see pp. 179–180), and very early in the League's history possibilities for discriminatory action in regard to treaties submitted for registration were foreseen. The First Assembly on 23 November, 1920, asked the Council to examine the scope and meaning of Article 18, and that body appointed a commission of jurists whose analysis of the article was embodied in a report by a sub-committee to the First Committee of the Second Assembly. (Meetings of the Committees, Second Assembly, First Committee, Annex 11, p. 167.) This report itself did not suggest that the League had or should have any discretion as to treaty registration, but the matter was brought up in the First Committee discussions by M. Seferiades (Greece) who wanted to add the following clause to Article 18: "Any treaty, the provisions of which in the unanimous opinion of the Council are contrary to international public order, shall not be registered, and shall therefore be deemed to be non-existent." (*Ibid.* p. 77.) Objection to this proposal was voiced mainly by M. Scialoja (Italy) who contended that such a clause would confer upon the Council the right of deciding upon the validity of treaties in general and would tend to cause evasion of the registration provisions. (*Ibid.*) No action was taken upon the Greek member's proposition. The latter was and probably remains premature in the present state of international relations, but it is a significant straw indicating that the wind may be blowing toward "constitutionalism" in the treaty structure.

[4] Mitrany, *op. cit.*, p. 71.

obligations; political in that their efficacy and elaboration depends upon the attitude of states toward treaties, treaty revision, and arbitration of conflicts arising out of treaties.

Before considering in order these three factors regarding treaty sanctity, it should be pointed out that sanctions deal with treaty violation and infringement, and not with execution. Failure to execute a treaty, that is, to carry out its terms, may constitute an infringement, a "passive injury," but the means for executing a treaty are not sanctions, though the threat of the latter may further the former.[5] Law enforcement is a different function from administration; the two may be entrusted to the same agency but the distinct nature of each should be kept clear. A large amount of domestic legislation is not self-executing; administrative agencies are required to put the laws into effect and usually a separate organization attends to enforcement and police. However, a traffic officer may both execute the ordinances and make arrest for their violation. Treaties, likewise, are seldom self-executing: something usually must be done to put them into operation, and to carry out their terms. Until the 19th century, execution was left almost entirely to the individual signatory states, but in the last century and a half, with the scope of the activities dealt with in treaties ever widening, a host of international bureaux, commissions, and conferences, has come into being to take charge of treaty execution. These organizations have frequently been empowered not only to handle matters of administration, but also questions of violation, and the two duties of administration and enforcement have thus often been placed in the same organization. The proposed disarmament commission, for example, not only would superintend the carrying out of the treaty terms, but would deal with infringements of the conventions.[6] The application of treaty sanctions has, in this manner, frequently been given to definite international agencies which in limited fashion have become an international administration and enforcement office all in one. This coordination of sanction procedure in the hands of specific international organizations has considerably increased the efficacy of certain types of sanctions, and will be discussed more fully later under the heading of implementation.[7]

[5] See Wright, Q., *The Control of American Foreign Relations*, secs. 137–138.

[6] Draft Convention of the Preparatory Commission for the Disarmament Conference. Off. Doc. C687. M 288. 1930. IX. Articles 40–52.

[7] See Chapter V.

Now as to the factors tending to qualify the doctrine of treaty sanctity which has proved one of the chief stumbling blocks in the development of treaty sanctions of a comprehensive variety:

## I. The Legal

As Ramsay MacDonald said during the spring of 1933, when he was engaged in drafting the Four-Power treaty for political collaboration, "Treaties are sacred, but not eternal."[8] The law postulates that treaties are inviolable but has heretofore done little to provide an orderly process for revising or terminating them. Publicists usually state that treaties are extinguished "when their objects are satisfied as when a state which, by convention, has agreed to pay a certain sum, completes payment, though a treaty is not terminated when the acts contemplated by it leave legal obligations behind them, as in a treaty of cession."[9] Engagements of this sort are designed to establish a permanent state of affairs and provisions for change are not ordinarily included. According to the text-writers, also, treaties may become void, a) by mutual consent of the parties, b) by express renunciation by one of the parties of advantages taken under it, c) by denunciation, when the right of denunciation has been expressly reserved. (This will be discussed more fully under the practise of states, the second factor,) d) by execution having become impossible, e) when an express condition upon which the continuance of the obligation of the treaty is made to depend, ceases to exist, and f) by incompatibility with the general obligations of states.[10] The law, as expounded by publicists, thus recognises that treaties are not eternal and may become void or extinct, but the difficulty is that the above principles are for the most part so extremely vague. Though a treaty of cession, once executed, may be said to be extinguished, this annihilation of the legal obligation to cede is of small import as long as the results of that cession are deemed to be perpetually binding. As for the voiding of treaties, method a) obviously gives no problem, *unless*, and this is the crux of the matter, one of the parties refuses consent. The treaty then is forever binding, so decrees the law, unless it falls under one of the other mentioned categories. As for these: how often is the event envisaged in b) likely to occur? Under d), e), and f), who determines whether execution is impossible, who decides

[8] New York *Times*, 31 March, 1933.
[9] Hall, W. E., *International Law*, 8th ed., p. 404.
[10] *Ibid.* p. 405

when an expressed condition has ceased to exist, and who declares that a treaty is incompatible with the general obligations of states? The law under f) takes note of what has been called evaluation or "constitutionalism," but the note-taking is ineffective without the existence of an international agency discussed later under the third factor. Political organization is here necessary to interpret and bolster the law. Disputes between states over the application of the principles in d) and e) are more than possible, and here again international machinery for pacific settlement is requisite for a solution. Otherwise a state must either abide by a treaty it considers void, or run the risk of being classed as a violator or of being coerced by the other party or parties into observance. The rather indefinite legal principles need to be implemented by international, judicial, or arbitral bodies if they are to have genuine usefulness. Factor 1) is inefficacious without factors 2) and 3).

What does the law in itself offer as a general test of the existence of the obligatory force or voidability of a treaty, which an international agency might apply? Here enters that nebulous doctrine referred to as "rebus sic stantibus." Most publicists refer to it bravely as if it were well understood and then blithely refuse to state its meaning.[11] Origins of the doctrine are obscure, but apparently it is a product of an earlier practise of inserting into treaties a special clause—clausula rebus sic stantibus—to the effect that the obligations of the treaty were to be binding, "things remaining the same."[12] Subsequently, the "clausula" has been omitted from the actual treaty, but its spirit is presumed to permeate its text, and to exert an indefinable influence upon its interpretation. Rebus sic stantibus really belongs to the metaphysics of international law; it exists, if at all, as a wraith, somewhere in the legal stratosphere. Most lawyers are content to say it exists, and there are few legal Piccards to make the ascent to see what it is all about, and to bring it down to earthly applications. Such a soaring will not be attempted here, but the general implications of what the doctrine is deemed to be may be discussed along with certain problems.

[11] "Neither party to a contract can make its binding effect dependent at his will upon conditions other than those contemplated at the moment when the contract was entered into, and on the other hand, a contract ceases to be binding so soon as anything which formed an implied condition of its obligatory force at the time of its conclusion is essentially altered." *Ibid.*, p. 407. See also B. Schmidt, *Über die völkerrechtliche clausula rebus sic stantibus;* Westlake, J. *International Law*, I., p. 295.

[12] Butler, G. and Maccoby, S., *The Development of International Law*, pp. 518–525.

Rebus sic stantibus seems to mean—the word "seems" is used advisedly, because clarity in regard to this matter is nonexistent—that treaties are binding, only so long as things, i.e., conditions, remain the same. Since things or conditions never remain the same, the doctrine, if taken literally, would signifiy that treaties would be binding for scarcely any length of time. Rebus sic stantibus, then, is interpreted as meaning "certain," not all, things, remaining the same or "essentially," the same. But which or what "certain" things? If a state leases an island and a tidal wave engulfs the island, it is asserted that the treaty making the lease obviously would no longer be binding, rebus no longer sic stantibus. That seems obvious, but when a treaty with Prussia in 1828 is still held to be binding even though Prussia has expanded into the German Empire,[13] "things" have changed substantially without apparently affecting the binding force of the engagement. Changes in the form of government are not some of the "things" practically included within the doctrine. Likewise, the existence of a war is not to be deemed one of the "things" undermining the effect of certain treaties, even though such a contingency was not especially envisaged by the treaty framers.[14] The doctrine has never been carefully formulated or designed and has been rather casually assumed to apply to some treaties and not to others. Some investigators have even gone so far as to suggest that there really is no such principle, or that if there is, it is employed so haphazardly and arbitrarily as to be of small value.[15] Analysis of the documents in the instances where the doctrine was alleged to have been invoked, shows that rebus sic stantibus played an insignificant part, the violations being based upon other grounds for the most part.[16]

At this point, a suggestion of A. D. NcNair is of great service as a clarifier. He points out that a treaty is used to perform internationally several different functions which in municipal law are taken care of by a variety of instruments, and offers a classification of treaties in the following manner: 1) Treaties which are in the nature of a conveyance, 2) Those which are "contractual" in form, 3) Those which are "constitutional," 4) Those which are law making, and 5) Those which are similar to charters of incorporation.[17] In as much as the

[13] *Terlinden* v. *Ames*, 184 U.S. 270.

[14] *Society for the Propagation of the Gospel, etc.* v. *the Town of New Haven*, 8 Wheaton 464.

[15] Lauterpacht, H., *The Function of Law in the International Community*, pp. 270–283.

[16] *Ibid.*, p. 270.

[17] "The Functions and Differing Legal Character of Treaties," *British Yearbook of International Law*, 1930.

rebus sic stantibus doctrine is most analogous to the "impossibility of performance" principle of municipal contracts, Professor McNair believes that the doctrine is applicable only for treaties which are of a contractual nature, that it has possibilities of elaboration in a judicial manner for treaties of this character, and that for changes in other treaties, those of the law-making variety particularly, a legislative, rather than a judicial process, is required. This route looks promising and hopeful, and leads to the matter of Article 19 of the Covenant to be discussed later. By recognizing that treaties fall into different classes, and by providing specially suitable modes of enforcement and revision for each type, the problem of treaty sanction and observance becomes easier. Heretofore, the lines between the various kinds of international engagements have not been clearly drawn, and doctrines like those of sanctity and rebus sic stantibus have been considered quite broadly and indiscriminately.[18]

Rebus sic stantibus, legal will-o-the-wisp that it is, has nevertheless been of service in calling attention to the fact that there may be some grounds for annulling or cancelling a treaty obligation which no longer fits new conditions, and that treaties with no clause for termination or revision may not legally be eternal. It should be remembered, however, that rebus sic stantibus in itself, never brings a treaty to an end; it does not operate directly, but merely serves as a ground or a basis for declaring that a treaty is terminated. Diplomatic action and formal announcement are required to sever the bonds, rebus sic stantibus serving only as the legal pretext for declaring that the obligation no longer holds.[19] International law in itself has thus been backward in evolving a satisfactory method of dealing with the revision or termination problem.

The sanctity principle is static; the life of states, like all life, is dynamic. Static dogma can never be made to fit easily into the facts of an ever-changing, ever-fluid state of international relations. Yet, there must be some barriers, some limits, to an unregulated Hera-

[18] As examples under his classification, McNair cites under 1) treaties of cession and boundary, 2) treaties of alliance, neutrality, commerce, and fishing, 3) Hague Convention I, Covenant of the League of Nations, Statute of the Permanent Court of International Justice, and the Pact of Paris, 4) International labor conventions and the Hague conventions on rules of warfare, and 5) treaties establishing international unions and the Bank for International Settlements.

Sir John Fischer Williams argues that rebus sic stantibus is applicable for such treaties as those between China and the Powers conferring extraterritorial jurisdiction. *A.J.I.L.*, XXII, 95.

[19] *American Foreign Relations*, 1930, p. 149.

clitean flux of events, and unsatisfactory and weak as it has been, the doctrine of the absolute inviolability of interstate engagements has existed in response to a definite demand for fixity and permanence somewhere in the flow of events. The problem, therefore, is not the simple one of retaining or discarding a time honored principle; it is one of adapting a principle so that it may be of useful service. Hitherto the sanctity doctrine has attempted the impossible—to dam the stream, rather than to canalize it.[20]

Undeniably, the existence of the rule that treaties are inviolable[21] has been a stabilizing factor in the relations between states, and despite several dramatic infringements of the principle, such as the invasion of Belgium in 1914, the vehemence with which its existence is affirmed by the text writers and statesmen shows that considerable vitality in the doctrine is not lacking. So much is not denied. What is maintained, however, is that treaties in practise are not nearly as sacred as they are legally supposed and frequently thought to be, and that the principle, despite the benefits it undoubtedly has conferred upon the state of international relations, and despite the fact that for the great bulk of inter-state agreements its application is seldom questioned, is in need of reconsideration. As it stands in the texts of publicists, and in the generally accepted authoritative statements of political leaders, it is an impossibly severe and strict doctrine, one which unmodified and unqualified fails to meet the tests of reality.

How to maintain order and at the same time allow for the processes of change is one of the fundamental problems of all human affairs.[22] In the international realm the rule that treaties are sacred has represented the "order" side of the question. As suggested above, it has developed in response to the inevitable demand for some assurance of

[20] At the 13th plenary meeting of the Fourth Assembly of the League of Nations, M. Barthélemy, (France) said, apropos of Article 10 of the Covenant, "First, there is a negative obligation—to respect the territorial integrity of states. Had we attempted to say that the condition of the world, as settled by the treaties, is fixed for all time . . . we should doubtless have deserved the reproach of Utopianism. . . . This is not the meaning of Article 10. It does not set out to dam the stream of history, to convert it as it were, into a stagnant lake or marsh; it aims only at canalizing the waters of history by laying down that, if there must be territorial modifications, they should be carried out by peaceful negotiations under the protection and auspices of the League." Records of the Fourth Assembly, p. 87.

[21] *Protocol of London*, 16 British and Foreign State Papers, p. 1198.

[22] "Law must be stable and yet it cannot stand still. Hence, all thinking about law has struggled to reconcile the conflicting demands of the need of stability and the need of change." Pound, R., *Interpretations of Legal History*, p. 1.

stability in international society. In municipal affairs, the counterpart of this situation is found in the sanctity of contracts and inviolability of law doctrines, but while domestic law has frankly found it impossible to insist upon the perpetual and binding force of all contracts and rules, as expounded by Sir George Jessel in the famous case of *Printing Co.* v. *Sampson*,[23] and has provided legal means for release from too onerous obligations, international law has not developed this corollary of the sanctity view with the result that the doctrine becomes unworkable if insisted upon without modification. In domestic affairs, states unblushingly repudiate "sacred" contracts by legislative enactment when "public policy" demands it, as witness the repeal of the "gold clause" by the Congress of the United States in June 1933, or the stabilization of the franc at four cents in 1926, or the moratorium laws for debtors. Thus, internally, by judicial interpretation and legislative action obligations are made elastic when deemed necessary, and the difficulties of an impossibly rigid doctrine are surmounted. Similar complementary developments to the sanctity notion have taken place on no such scale in the international sphere, and except for principles and practises and the modifying doctrine of rebus sic stantibus already discussed, the treaty sanctity notion is left legally quite high and dry with relief from unbearable or inflexible provisions to be sought in a crisis often only by illegal means. Order versus change, or as post-war parlance has it, "status quo versus revision": such is the perpetual problem. We need our cake of order, but must eat it too. The apparent dilemma has been met in municipal affairs by court decisions and legislation furnishing escape from contracts, obligations, and situations no longer considered either in the public or private interest; treaty sanctity, however, unsupported by any qualifying international legal doctrine or legislative machinery tends inevitably to place a strait-jacket upon the relations of states. Legal escape is not as possible as it is in intra-state matters.

Those who profess to uphold the sanctity of engagements as an eternal and inviolable principle not only ignore the plain facts of everyday human experience, but also fail to discern that neither sanctity nor revision, neither order nor disorder is inherently superior or preferable to the other, and that both are relative to the needs and desires of the community, be it national or international, as manifested by the "sense of right," the "higher law" or the general

[23] L.R., 19 Eq. 465.

"consensus" of that community.[24] For very practical reasons, the community holds that treaties and contracts are generally inviolable; also for very practical reasons, the community declares that those engagements must be modified at certain times, when the "situation demands it." In the domestic realm it is for the court or the legislature to decide. If those institutions do not determine, and no general agreement is possible, the irrefutable fact is that a "sphere of anarchy" exists for the moment, and must be openly acknowledged[25] while courts and Congresses do their best to enforce what they believe the "sense of right" requires and to lead the way from chaos. Internationally, no courts or legislatures yet exist to decide when the "situation demands" an abrogation of a contract, or the modification of an obligation, and states hitherto have for the most part unilaterally declared for themselves. In deciding to modify or abrogate an agreement, municipal courts and assemblies, and national states, base their actions upon equity, "superior public policy," or a higher principle of right which, they declare, must prevail over the narrower legal obligations. A higher law or a rule of some sort is appealed to and made to apply. Whether this equity or higher law actually exists as an absolute, and whether there is a basic, ethical rightness in a Platonic or Kantian sense underlying human affairs, which is invoked in instances of this sort, is a question for metaphysics and political theory far beyond the scope of this volume. It suffices for practical purposes, that states and individuals, in asking for release from obligations, act and argue as if there were a "justice" calling for revision. The community "sense of right" which supports now the sanctity principle, now the principle of revision or abrogation, depending upon the circumstances, may be a general will in Rousseau's sense, it may be the basis of a "natural law with a changing content," as Stammler suggests,[26] or it may be merely popular desire unrelated to any basic ethical pattern of human existence, but whatever it is, it is there to ask for the enforcement or modification of contracts and engagements, as if it were clothed with sacred authority. The "Philosophy Of As If," may explain conduct, even though it does not answer ultimate questions.[27]

In the world of states, the development of a "sense of right," to

[24] Krabbe, H., *The Modern Idea of the State*, Chapter x.
[25] Lippmann, W., *The Phantom Public*, p. 161.
[26] Stammler, R., *Die Lehre von dem Richtigen Rechte*, pp. 93–98.
[27] Vaihinger, H., *Die Philosophie des Als Ob*.

pass judgment upon the advisability of enforcing or non-enforcing compacts has been slower than in municipal areas. Partly as an analogy from municipal contracts, partly as a deduction from the law of nature,[28] and partly as a matter of obvious necessity, the doctrine of treaty inviolability has come into international law. But when is the doctrine to be modified, when are principles of "higher" justice and of "higher" needs, to be invoked? International law is silent, except for the nebulous doctrine of rebus sic stantibus, and individual states have answered these questions for themselves, the embryonic nature of international government, and the hold of isolationist doctrines upon widely separated states being conducive to the continued existence of a virtual state of anarchy in the matter, legally speaking. Practically, of course, the international community has recognized that treaties are sacred as a general principle—abiding by treaties most of the time, is a matter of expediency, if not of ethics—and has not yet been able to elaborate appropriate modifications of the doctrine. Such modifications as there have been, have come in specific cases as states individually have determined, with only a semblance of international community action—legally—as in 1871 at London.[29] The stress of the fathers of international law upon "inviolability" and the apparent need of that stress because of the anarchic character of international society bequeathed to later eras a strongly developed doctrine of treaty inviolability with no corresponding principle of modification. The result has been that an impossibly rigid principle was emphasized to the detriment of international society, which as it began to achieve order also required means of change. The law, as yet, furnishes little such, and extra-legal measures are resorted to to circumvent the rigors of a useful but not sufficiently qualified rule. Thus a doctrine which was designed to promote order and stability may breed the opposite, namely, violent attempts at extrication from fixed and absolute bonds.

The world, thus, is squarely face to face with the paradox contained in the statement of MacDonald quoted above. Treaties must be sacred, otherwise there can be no assurance of order; but treaties must not be so sacred that they are unalterable; otherwise, unrest and disorder are well nigh inevitable. The invasion of Belgium in 1914 crystallized the world's sense of right in favor of the strict ob-

[28] Grotius, *De Jure Belli ac Pacis*, Bk. II, Chap. XVI, I; Vattel, *Law of Nations*, Bk. III, XV, 221.

[29] *Protocol of London, op. cit.*

servance of treaty obligations; the nightmare of 1914 has haunted post-war conferences and increased the demand for "security," states, large and small, earnestly striving to make certain that covenants will be kept. Lack of faith in the pledged word contributes greatly to the sense of "insecurity" and is the psychological incubator for the innumerable schemes for sanctions and enforcement. These plans for universal coercive measures, however, have encountered not alone the traditional hesitation of states to employ their forces and strength on behalf of causes not immediately of concern to themselves, but also a wide-spread suspicion that certain treaties and obligations *ought* not to be kept inviolate. Here is the root of the problem. While the "sense of right" does support the sanctity principle in general, it also is developing discrimination. Perhaps some treaties would be better unkept. Municipal law refuses to sanction contracts concluded under duress; further, it makes allowance for inability of performance and applies equity to mitigate particular severities. International law as yet does not discriminate in such fashion, all treaties being sacred according to the general formula. Chinese agitation against the "unequal treaties" and German insistence upon revision of the Treaty of Versailles have, however, aroused misgivings concerning the universal and unqualified application of the doctrine of sanctity. The Japanese, in the years 1931–33, maintained, as one of their most cogent arguments to defend their course in Manchuria, that though technically they might have violated international covenants strictly construed, they were justified in acting as they did because certain obligations no longer ought to have been observed when China was in a lawless, chaotic state.[30] There is, thus, considerable reluctance to guarantee any status quo as determined by treaty, despite the strong conviction that as a general rule treaties must be observed. Order is required, but what kind of an order? Such is the question. The world is increasingly hesitant about stereotyping any status quo simply because it is a status quo fixed by treaties, and because the doctrine of inviolability decrees that treaties are sacred. Belief is cur-

[30] In his address before the 9th Plenary Meeting of the Special Session of the Assembly, 6 December, 1932, M. Matsuoka said, "All the world is in a constant state of change. All objects animate and inanimate, are constantly moving, let us hope, towards a better state. Might not the League well take cognizance of the ever-changing conditions in the East and judiciously adjust its views and actions to them? As we Japanese read the Covenant, it is not a hard implacable instrument." Japan's Case in the Sino-Japanese Dispute, published by the Japanese Delegation to the League of Nations, Geneva, 1933, p. 23.

rent that the covenant-breaker may not necessarily be the wicked culprit. Those who have wrestled with the problem of defining an aggressor well know that he who formally violates the stipulated bond, may, after all, have justice on his side, and not merit condemnation. That is the danger of formal and arbitrary definitions of aggression: the technical violator may not be the "real" one.[31]

The problem may be summed up in this fashion: sponsors of comprehensive schemes for sanctions to be used against an aggressor rely upon the doctrine that treaties are sacred, and that aggressors are usually treaty breakers, while at the same time there is widespread unwillingness to support all treaties indiscriminately, and while there is lacking sufficient law and machinery to alter certain treaties which might become obsolete and whose violation might legitimately be condoned. This is another way of saying: the need for order meets the need for change.

## II. Practise of States

Though international law at present has emphasized the sanctity principle more than measures of change, and though nothing comparable to the municipal methods of abrogation and alteration has yet grown up, certain developments have come which indicate that the disparity between these two types of law may not be so great in the future. This leads to the second factor, namely, the practise of states increasingly to conclude treaties for limited periods and to provide for denunciation at stated dates. Whereas most of the treaties before the 19th century were made in perpetuity, later practise has been to make engagements of relatively short duration. Commercial and extradition treaties for example are nowadays mostly of that type.[32] Many conventions call for periodic overhauling and revision[33]

[31] See Eagleton, C., *The Attempt to Define Aggression*, Intaternional Conciliation, No. 264.

[32] For a list of treaties between the United States and other powers containing provisions for denunciation or withdrawal see material submitted by Elihu Root in the "Hearing before the Committee on Foreign Relations, United States Senate, 71st Congress, 3rd Session, relative to Protocols concerning Adherence of the United States to the Court of International Justice." 21 January, 1931.

[33] E.G. Convention for the Protection of Literary and Artistic Works, 2 June, 1928, League of Nations, No. 2816, Article 24, "1) The present Convention may be subjected to revision with a view to the introduction of amendments calculated to perfect the system of the Union. 2) Questions of this nature . . . are considered in the Conferences which will take place successively in the countries of the Union . . ."; Universal Postal Convention, 28 June, 1929, League of Nations, No. 2368, Article 12. "1) Delegates from the countries of the Union meet in Congress not later than five years after the

and the great naval limitation of armament treaties of 1922 and 1930, were made for 14 and 6 years respectively, and further contained the famous "escalator" articles permitting release from the treaty terms, if outside circumstances required it.[34] This widespread usage has tended greatly to overcome the dangers inherent in the inviolability doctrine; ties that might become too irksome can be thrown off after a certain time, and signatories are spared the dilemma of either abiding by obligations no longer consonant with actual needs, or of accepting the onus of being classed as law-breakers. This practise would go far towards resolving the paradox previously discussed were it not for the fact that it is precisely those treaties concerning which there is, in the main, the greatest anxiety and difficulty over observance which contain no provisions for denunciation or revision. Peace treaties do not usually include among their articles any mention of possible legal change: so far as the Treaty of Versailles is concerned German boundaries are fixed for eternity. Likewise, one of the so-called "unequal" (not legally unequal) treaties with China, that of the United States of 1880, makes no mention of future alteration and is for an indefinite period.[35] How may a state which no longer desires to continue the treaty legally obtain release?

## III. Legislation and Article 19 of the Covenant.

The view that a treaty is a contract between two nations,[36] not a "legislative act," has tended to obscure the true situation in regard to treaties and to bring forced analogies of national law into interstate relations. As McNair suggests,[37] only certain types of treaties should properly be grouped as "contracts," while a vast number of modern conventions are really "constitutional" or "legislative" in form and should be dealt with as such. Rebus sic stantibus being akin to the doctrine of impossibility of performance in private contracts is applicable only for truly "contractual treaties," and for treaties of the legislative type another legal means of revision, release, or change is essential, namely, a process of legislation. This legislative process is found lurking in embryonic form in Article 19 of the Cove-

effective date of the Act of the preceding Congress, with a view to revising and completing them as necessary. . . ."

[34] Article 21 of the Treaty of Washington, 6 February, 1922, Malloy, III, p. 3100; Article 21 of the Treaty of London, 22 April, 1930, U. S. Treaty Series, No. 830.

[35] Malloy, I, p. 239.

[36] *Foster* v. *Neilson*, 2 Peters 253.

[37] *Op. cit.*

nant of the League of Nations and in the powers of the conferences of various Unions. Elaborate arrangements for preserving order rest ultimately for their efficacy upon a psychological and moral base which must support the purposes of the treaty and the situation brought into being by the treaty, and until the procedure for treaty revision—for the bringing of treaty terms up to date and in line with the demands of a changing world—is more carefully worked out progress in the development of international law and treaty sanctions will be halted.

Sanctions, except those of a purely psychological character, such as a sense of shame, or fear of divine censure, are seldom automatic; they ordinarily require the cooperation of particular human agencies for their application and those agencies cannot be made to function unless there is the sense that they ought to function and that the community demands that they take action. There is ever required a sanction for most sanctions: Quis custodiet custodes? Answer: the community sense of right which determines which treaties, laws, rules and orders, are to stand and when they should be altered. Domestic police agents and domestic juries are lax in their duties whenever it is apparent that community backing is no longer manifest in support of a law. Treaties, like all law, rest upon that community sense of right and so do the sanctions. Domestically, a legislature may repeal or alter an obsolete enactment; internationally, "constitutional" treaties as yet come before no legislative body for an overhauling, and strong sanctions for those treaties will be difficult to secure until the legislative procedure grows apace.

International law is replete with paradoxes, but few are as outstanding as the one concerning treaties of peace.[38] Coming within the embrace of the sanctity principle, regardless of content, these treaties are legally "sacred" even though they establish a state of affairs brought about by means contrary to international law, namely, by force used to deprive a state of territory, persons, and possessions supposedly guaranteed as fundamental international law rights of states. There is, thus, something inherently contradictory in talking of the sanctity of treaties, and in using sanctions on behalf of treaties which, while "legal" from the point of view of international law today, may be contrary to the interests of the international community as a whole. What are those interests? Hitherto, there has existed no instrumentality by which those interests could be adequately weighed

[38] Eagleton, *The Attempt to Define War*, International Conciliation, No. 291, p. 12.

or determined. Individual states have acted hit or miss, making war, signing treaties, bargaining with each other, and setting up treaty relationships until a crazy-quilt of treaty obligations has come into being all at one time. Do all these conventional agreements, created in haphazard fashion, find shelter under the sanctity roof? Legally, in the strict sense, yes. *Ought* they to? That question is being asked more and more, and as previously mentioned, a sense of discrimination is discernible on the part of states and their representatives.[39] The world's garden of treaties needs weeding. Sanctions cannot and ought not to apply to all, and it is an international agency for the most part which must act selectively in regard to treaties. As long as there are wars there will be peace treaties; as long as there are peace treaties, there will be "unequal" (not legally unequal) relationships; as long as there are unequal relationships there can be no satisfactory status quo, and until there is a satisfactory status quo, there ought not to be, and probably cannot be a very efficient or useful scheme of universal sanctions. The world's peace machinery must be devoted to the task of treaty analysis and revision, as well as to the business of treaty enforcement and the prevention of war.

Why did the states of the world hesitate to apply sanctions against Japan in 1931–32 and '33? Was it merely because the Covenant spoke of a "resort to war" and not of a "resort to force," as the valve for the turning on of sanctions?[40] Would that have made such a great difference? Was it because states were unwilling to abandon "neutrality" and "isolation?" Was not one reason, and a very fundamantal one, the fact that states were not sure that Japan *was* so greatly in the wrong and that coercive sanctions *ought* to be applied in such a case? This seems to be a deeper cause for the reluctance to employ sanctions, namely the apparent lack of a consensus among the states that the situation called for strong enforcement measures. The Assembly report in February 1933 demonstrated that opinion had crystallized against Japan to a very great extent, but it may never be known how grateful the chancelleries of Europe and America were for that word "war" instead of "force" which permitted the nations to escape the job of applying drastic measures when such a course seemed undesirable. Strong sanctions must wait upon the development of vigorous community feelings in favor of any status quo and

[39] See ff. p. 6.

[40] Article 16. See discussion of that article pp. 139–149.

upon the creation of an agency to translate those feelings into action with due authority.

That plans for sanctions are futile unless there is a desire to apply and use them seems almost too obvious to mention, but schemers for water-tight, air-tight, swift and deadly coercive sanctions too often are prone to overlook the real reasons for having sanctions and for the failure of states to subscribe to their application at present. It is not so much a question of signing more pacts, working out plans in detail, or changing the formulae of covenants, as it is developing a sense that sanctions ought to be employed, and that sense is dependent upon the creation of international organization which can scrutinize, alter and judge the character of the treaties themselves, and fix the sanctions accordingly. Rigid definitions of aggressors and automatic sanction schemes are dangerous, and must fail to produce the desired results until flexibility in the treaty arrangements is brought into being. It is not a question of having or not having sanctions, of self-help or of international coercion—sanctions and community action probably are ultimately essential for world order—but it is the *kind* of world order and the provisions for its peaceful change which are the primary matters. There is little use in advocating coercion until the community is ready to agree upon the purposes of that coercion and upon supporting them in full. That certainty of agreement and of willingness, and the flexibility to provide for change, is to be found in some sort of legislative procedure.

When the word legislative is mentioned it must not be thought that a full-fledged International Parliament is necessarily envisaged as a prerequisite for any advance toward a solution of the problem of sanctions. Any type of body, be it a council, a committee, a board, or a conference, to which is entrusted some measure of authority to pass upon treaties which affect the world at large would perform legislative functions, that is, decide what the "law" of the world is to be.

For bi-lateral treaties of extradition and commerce, of interest merely to two states, such a procedure might not be as essential as it would be for treaties which affect a large number of states, or which establish a "constitutional" régime of some sort. However, even a commercial treaty between only two nations may be of major concern to all other powers so that in the long run only a very few treaties would not have to run the guantlet of examination by an international organization. Treaties, like wars, are of concern to all

states. There was a time when an employer's contract with his workers was regarded as being beyond the notice of the public within the state, but now, what formerly were purely private engagements have become "clothed with a public interest." Courts may declare certain types of contracts illegal; legislatures may specify what manner of "private" agreements are compatible with public welfare. Similarly, treaties between two nations may be today of great political, if not legal, concern, and what technically may be an engagement simply between a few powers, may legally create rights in favor of outside third parties.[41] Strictly speaking, international law is still in the laissez-faire era in regard to international conventions. Legally, states may conclude agreements and bind themselves as they please, and no legal barrier exists to veto or review such actions. Politically, of course, the situation is different, just as it is in regard to equality which, legally, is one thing, politically, another, but the political facts of today may crystallize into the law of tomorrow, and as repeated before, a tendency toward discrimination between treaties is becoming evident. They no longer are all born free and equal in the eyes of the community of nations.

International supervision of treaties and their making may develop along two lines. According to one, the treaty would be considered null and void, illegal from the outset, and is the method already apparent in some of the plans for the amendment of Article 18 of the Covenant[42] and in some of the suggested implications of the Stimson Doctrine.[43] Treaties, thus, might be "unconstitutional," contrary to the accepted framework of international organization. In the past, this passing upon treaties has been performed crudely and in straight political fashion by the Great Powers who found that certain arrangements were inimical to their own interests. The Concert of the powers, or groups within the Concert, acted as a "court" and "legislature" to maintain or set up an arrangement in harmony with their views. The Covenant of the League, the nearest the world has come to a constitution, provides that all agreements contrary to its provisions "shall be terminated."[44] No procedure or international supervisory

[41] E.g. Sweden was not a party to the convention of 1856 which demilitarized the Aaland Islands, but Sweden "could insist upon compliance with its provisions in so far as the contracting parties had not cancelled it." *Off. Jour.*, Sp. Supplement No. 3, October, 1920. pp. 17–18. See also McNair, *op. cit.*

[42] *Op. cit.* p. 7.

[43] For discussion of this doctrine see pp. 171–175.

[44] Article 20.

agency is established, but this notion of "unconstitutionality," of the basic value of some treaties as contrasted with that of others, makes legal entry into the international picture in Article 20. Annulment of treaties, the declaring them null and void, is essentially a judicial process, and though suggestions to date center around amendments to Article 18, perhaps ultimately the task will be entrusted to the Permanent Court of International Justice. As yet, internationally, the lines between judicial, legislative, and executive, have not been clearly drawn and the process of distinction between functions undoubtedly will be a slow one. It has been suggested in accordance with the view of Professor McNair, that it would also be the duty of international courts to apply the doctrine of rebus sic stantibus to the contractual type of treaty. This would be a further judicial mode of supervising international conventions.

The other line along which international supervision may proceed is a legislative one toward the review of international agreements. Many of the great conventions, like that of the International Postal Union,[45] and that of the International Institute of Agriculture[46] and others provide for periodic review and reformulation. Provisions for denunciation and abrogation or for consultation also aim in the same direction, though in a limited way, that is, limited as to the number of powers engaged, as to the purpose of the treaty, or as to the authority delegated to the reviewing agency. What is needed, and perhaps what will ultimately be attained, is an international agency to centralize this function of review and to possess adequate powers of revision.

It may sound absurdly visionary to speak of an international legislative authority, but is it any more visionary than to plan for international sanctions? Staunch believers in the immediate feasibility and desirability of universal coercive measures may point to English history, and state that courts and sheriffs come first,[47] but peace cannot be brought about simply by coercion, sheriffs and force. There must be some will for it, and that will cannot be created by punitive measures alone. How much of the peace of England is due to the trappings of royalty, to the glamor of kingship and national pride? Surely, the sense of unity, of vicarious participation in the grandeur that is the nation played a great part, and went hand in hand with

[45] League of Nations, No. 2368.
[46] *Ibid.*, No. 96 (a).
[47] Hindmarsh, A. E., *Force in Peace*, p. 142.

fear of punishment by the king's sheriffs. The relative influence of these factors must be a matter for debate, but sanctions alone are not sufficient to bring peace and the habit of obedience. Similarly, internationally, sanctions for treaties, for enforcement, are not enough, and in fact cannot be successfully used until there is a consensus that they ought to be employed. That consensus will grow only when more adequate provision is made for establishing the kind of peace which nations will feel inclined to support. The habit of obedience will then increase not only through fear of punishment,—a not altogether satisfactory but sometimes necessary mode of ensuring observance—but also through genuine enthusiasm for the kind of order that is to be maintained. The problem is therefore not the simple one of having courts, and then sanctions to bring order. There must first be some sense that order is desirable, and that it is not an eternally fixed order. Even if the English sheriff was as important as the court and was of paramount importance in bringing order, and if the existence of a king who could dispense justice and alter existing rules was not sufficient to bring a will for common peace, the experience of recent years shows that the international scene is different. International sheriffs and police cannot be engaged and cannot be put to work until the community is surer that peaceful change is possible. Plans for peaceful revision, arbitration, for international legislative action, and for judicial powers over contractual agreements at least must supplement and be coordinate with plans for sanctions. Talk of treaty enforcement is not very practical until treaty relationships become more flexible through international legislative developments.

In this discussion it is not denied, and in fact it is later pointed out that treaty sanctions have been and are useful. The kind of sanctions which have been considered just above are merely the most complete, drastic, and spectacular sort, the community use of force variety found in Article 16 of the Covenant. This most comprehensive type must wait upon arbitration and revision machinery. It may be objected, however, that though it is not yet efficacious for all kinds of treaties and for dealing with all problems of world order, yet it should be employed to maintain the obligations of the Covenant for peaceful settlement: Japan *ought* to be made to conform with Article 12. Is that the consensus of the world? Is the Germany of Hitler, is France, is any major power so certain? Sanctions imply that the order ought to be maintained, but when the order is violated, perhaps the treaty fixing the order, not the violator, is at fault. If the machinery for re-

vising and altering treaties is undeveloped and if a nation can escape from an impossibly rigid treaty order only by technically violating an article calling for peaceful settlement, should sanctions be called into operation?—or rather *can* they be? The merits of the Japanese-Chinese controversy are not at issue here. What is at issue is the fundamental problem of providing for international supervision over treaties, so that sanctions for those treaties will be practical and beneficial. This is not to minimize the importance of international sanctions or of the need for substituting community coercion for unregulated "self-help." It is merely to stress the fact that self-help will not readily be abandoned until nations feel that the community in utilizing punitive measures is operating to maintain an equitable status quo.

The need for an international legislative process was clearly recognized at the Paris Peace Conference in 1919 and significantly enough, revision procedure was originally an integral part of the territorial guarantee article, number 10. Later, the revision provisions were toned down, separated from territorial guarantee where they logically belonged, and inserted farther along as Article 19, an article hitherto much neglected in comparison with the attention lavished upon Articles 10 to 16. In the various proposed drafts of the Covenant, revision seems to have been thought of quite early in connection with the Phillimore Report published in March 1918, in the appendix to which Mr. Leonard Woolf was quoted to the effect that "a state is to be able to make a claim to have it declared that a treaty to which it is a party has become obsolete . . . by reason of one or another independent state concerned in such treaty or agreement having ceased to exist as such, or by reason of such a change of circumstances that the object and purpose for which all the parties made the . . . agreement can no longer be attained."[48] This was a statement of the rebus sic stantibus principle, which, strictly speaking, is a judicial not a legislative doctrine, and which should be of more value for contractual than for other types of international engagements.

A more clear-cut proposal for revision procedure to be included specifically in a Covenant plan was contained in Article 20 of Colonel House's project of July 16, 1918 which read, "The contracting powers unite in several guarantees to each other of their territorial integrity and political independence, subject however, to such terri-

[48] Wilson, F., *Origins of the League Covenant*, Appendix D.

torial modifications, if any, as may become necessary in the future by reason of changes in present racial conditions and aspirations pursuant to the principle of self-determination and as shall also be regarded by ¾ of the Delegates as necessary and proper for the welfare of the peoples concerned; recognizing also, that all territorial changes involve equitable compensation and that the peace of the world is superior in importance and interest to questions of boundary."[49] This proposition which related primarily to boundaries, not treaties in general, was incorporated virtually word for word as Article 3 in President Wilson's first draft, that of 18 July, 1918,[50] and appeared also in his second, (his first in Paris) on 10 January, 1919, and in his third.[51] That President Wilson was fully aware of the principle of revision as a corollary to his cherished territorial guarantee is further evidenced by his conversations with Isaiah Bowman, held on the vessel conveying him to France in December 1918, when the President said that a guarantee of territorial integrity would not be satisfactory unless it was supplemented by provisions "for later alteration of terms and alteration of boundaries if it could be shown that injustice had been done or that conditions had changed."[52]

Sir Robert Cecil, too, was cognizant of the dangers inherent in stereotyping a status quo by an unconditional quarantee, and in Article 1 of his draft convention of 20 January, 1919 proposed that, "If at any time it should appear that the boundaries of any state quaranteed by (this Article) do not conform to the requirements of the situation, the League shall take the matter under consideration and may recommend to the parties affected any modifications which it may think necessary. If such recommendation is rejected by the parties affected, the States members of the League shall, so far as the territory in question is concerned, cease to be under the obligation to protect the territory in question from forcible aggression by other states, imposed upon them by the above provision."[53] A neat automatic sanction for the enforcement of League recommendations is suggested by this article.[54]

Thus the two men most responsible for the drafting of the Covenant both favored coupling a revision clause with territorial guarantee.

[49] *La Paix de Versailles; La Documentation Internationale*, 1929, p. 57.
[50] *Ibid.*, p. 63.
[51] *Ibid.*
[52] Miller, D. H., *The Drafting of the Covenant*, p. 42.
[53] *Ibid.*, document 10, p. 50.
[54] See discussion of automatic sanctions pp. 162–169.

Why was such a plan not carried through? Opposition developed on the part of the French who dreaded any weakening of the status quo to be established by the treaties of peace, and on the part of such persons as Mr. David Hunter Miller who feared that the provisions of Wilson's Article 3 and Cecil's Article 1 would "legalize agitation in Eastern Europe for future changes."[55] The problem of treaty revision came squarely to the fore: if treaties are to be made too flexible there is danger of instability and lack of order; fixity of some sort is preferable to uncertainty: so ran the arguments of Mr. Miller, who in answer to Cecil's equally cogent remark to the effect that treaties are not immutable, and that provisions should be made for revision generally, replied that the real solution to the problem then in question was in a minorities guarantee.[56] Cecil saw the need of change and the danger of attempting to fix international relations into a cast-iron treaty mould, while Miller stressed the necessity of permanence and order, offering a guarantee to minorities which might in the future strive to alter the treaty status quo. Revision and status quo, need for order and need for change were clearly at issue, and status quo won for the time being, for, on his own initiative, Mr. Miller had omitted from Article 7 of the Cecil-Miller draft (Article 3 of Wilson's draft and Article 1 of Cecil's) all revisionist features, and Article 7 of the Hurst-Miller draft, which was the one submitted to the League of Nations Commission on 3 February, appeared devoid of any reference to possible future modifications in the territorial arrangements to be guaranteed.[57] President Wilson accepted the omission without protest, apparently convinced as to its necessity by the arguments of Mr. Miller, and by his anxiety to have his Covenant meet with French approval in so far as possible.[58]

Cecil, however, refused to give up the battle for revision, and when at its fourth meeting, on 6 February, 1919, the League of Nations Commission took up the discussion of Article 7 of the Hurst-Miller draft (later Article 10) he proposed that after the guarantee there be inserted the words, "Subject, however, to provision being made by the Body of Delegates for the periodic revision of treaties which have become obsolete, and of international conditions, the continuance of which may endanger the peace of the world."[59] This proposal

[55] Miller, *op. cit.*, pp. 52–53.
[56] *Ibid.*
[57] *Ibid.*, p. 71.
[58] *Ibid.*
[59] *Ibid.*, pp. 168–169.

went farther than the Article 1 of his early draft, for it referred not only to boundaries but to "treaties which have become obsolete" and "to international conditions," a much broader suggestion by far. Cecil's plan was not formally considered at this meeting, but came up once more at the eighth meeting on 11 February. Mr. Miller opposed the scheme, stating that only "the states themselves can revise their own treaties," and writing to Colonel House on 9 February, said that "if the British proposal meant that the Body of Delegates could do more than recommend, it would be unconstitutional," (from the point of view of the United States constitution).[60] Cecil obtained his object, however, at this eighth meeting, for though Mr. Kramar of Czecho-Slovakia declared that if the Assembly "were to become the judge of all treaties, it would have powers like those of an international Parliament,"[61] Cecil mollified the opposition considerably by saying that a unanimous vote of all states in the Assembly would be necessary for action upon treaty revision,[62] and President Wilson proposed a new article, then number 23, to put Cecil's plan into effect. Wilson's text of Article 23 which later became Article 19, read, "It shall be the right of the Body of Delegates from time to time to advise the reconsideration by the States, members of the League, of treaties which have become inapplicable, and of international conditions, the continuance of which may endanger the peace of the world." This was accepted.[63] Later on, Cecil talked to Wilson in an endeavor to get the latter to agree that Article 10 should read that the guarantee was undertaken "subject to the provisions of Article 23," but Wilson replied that the French would not accept any weakening of Article 10.[64] Thus failed the last effort to link revision to status quo guarantee, and the latter remained separated from its logical corollary.

The treaty revision Article, number 19, reading, "The Assembly may, from time to time, advise the reconsideration by members of the League, of treaties which have become inapplicable and the consideration of international conditions, whose continuance might endanger the peace of the world," emerged from the Peace Conference

[60] *Ibid.*, pp. 201–203.

[61] Procès Verbal No. 8, February 11 session, *Documentation Internationale*, p. 165.

[62] Miller, *op. cit.*, pp. 201–203. If the Assembly under Article 19 can only give "advice," is it true that unanimity for such action is required? The question has not been settled owing to the lack of sufficient interpretation and use of the article.

[63] Miller, *ibid.*

[64] *Ibid.*, p. 289.

as a notable recognition of the fact that treaties are not immutable, and that their obsolescence is a matter of public international concern. The mere fact of its insertion into a fundamental Covenant is of great significance, but its vague wording and the lack of practical application of its provisions leave its true meaning and usefulness to be discovered. Surprisingly little discussion took place concerning its import at the meetings of the League of Nations Commission and it seems to have been inserted into the Covenant chiefly as a concession to Sir Robert Cecil. However, the queryings of Mr. Miller and Mr. Kramar and the French brought to the fore certain fundamental questions in regard to it. First: as long as states retain their present treaty powers with full legal rights to sign, abrogate, and revise, at their own pleasure, how can much authority reside in the Assembly, which has the power only to "advise?" Secondly, if the Assembly should be given any genuine measure of authority, would that not make for constant agitation for revision and would it not jeopardize too greatly the stability of the world's treaty structure? And thirdly, is it possible for such procedure as Article 19 appears to envisage to be at all successful unless the Assembly does become a true Parliament, unhampered by sovereign treaty rights of states? Article 19 is important in giving recognition to an important treaty principle, that of revision, but it fails to provide anything but a very dubious and shadowy control to the revising body.

This article has twice been invoked and formally considered by the League since its inception. The results upon these two occasions do little to answer the above questions and raise other problems concerning the terminology of the article. The League was hardly established before the difficult task of deciding what, if anything, Article 19 meant was brought before the Assembly. On 1 November, 1920, Bolivia sent the following letter to the Assembly:

> Bolivia invokes Article 19 of the Treaty of Versailles with a view to obtaining from the League of Nations the revision of the Treaty of Peace, signed between Bolivia and Chile on 20 October, 1904.
>
> In support of the request, Bolivia, while reserving the right to offer proofs and declarations at a suitable moment, would submit the following facts.
>
> 1) That the treaty was imposed upon her by force.
> 2) Failure to carry out certain fundamental articles of the treaty which aimed at securing peace, for which Chile was to blame.
> 3) This state of affairs involves a permanent menace of war.
> 4) As a result of the treaty of 1904, Bolivia is now entirely shut in and deprived of access to the sea.[65]

[65] Records of the First Assembly, p. 595.

Here was political dynamite of the first order. The young League was confronted at the outset of its existence with some of the most ticklish problems of international law and relations, such as those concerning treaties made under duress, and revision of a treaty satisfactory to one party and not to another. The matter would have to be carefully handled, and at the suggestion of the President was put on the agenda of the Second Assembly. Before this body met, supplementary documents were offered by Bolivia to clarify the nature of its request. The Second Assembly referred Bolivia's request to a committee of jurists composed of M. Scialoja (Italy), M. Urrutia (Columbia), and M. de Peralta (Costa Rica)[66] and the latter stated in their report "that in its present form, the request of Bolivia is not in order, because the Assembly of the League cannot of itself modify any treaty, *the modification of treaties lying solely within the competence of the contracting states;* that the Covenant, while insisting on scrupulous respect for all treaty obligations in the dealings of organized peoples with one another by Article 19 confers on the Assembly the power to advise ("inviter") the consideration by members of the League of certain treaties or the consideration of certain international conditions; that such advice can only be given in cases where treaties have become inapplicable—that is to say, when the state of affairs existing at the moment of their conclusion has subsequently undergone, either materially or morally, such radical changes that their application has ceased to be reasonably possible or in cases of the existence of international conditions whose continuance might endanger the peace of the world; that the Assembly would have to ascertain if a case arose, whether one of these conditions, in point of fact, did exist."[67]

This report naturally enough was very agreeable to the delegate from Chile, M. Edwards, who said that, "If Chile were to accept an invitation from the Assembly she would be helping to establish a precedent fraught with the most disastrous consequences for the League of Nations. The Assembly would find itself inevitably constrained to extend identical invitations to all other states which have signed treaties of peace."[68] To this, M. Aramago of Bolivia, replied with considerable correctness that the committee had stated that the Bolivian request was not in order when that was not the question submitted to it, that the committee had ignored the supplementary

[66] Records of the Second Assembly, p. 261.
[67] *Ibid.*, p. 466.
[68] *Ibid.*, p. 467.

documents in which the true meaning of the Bolivian report was set forth, and disclaimed any intention on the part of Bolivia "of asking the League of Nations to proceed of itself to an immediate revision of the treaty of 1904," stating that Bolivia "simply desired that the League should ascertain, by means of a searching inquiry, whether the situation justified an invitation to the two states to proceed to a further consideration of the treaty for reasons laid down by the Covenant itself."[69] Bolivia, however, accepted the jurists' report for the time being, reserving "the right to submit its demand afresh to the League of Nations."[70]

In this fashion the Assembly evaded responsibility for searching further into the meaning of Article 19. The matter was shelved, thanks to Bolivia's willingness not to press the point, and a dangerous topic was put aside for the moment. What is the result of this first discussion of Article 19? The jurists' report makes it plain that the powers of the Assembly stop with "advice" and that only the contracting parties themselves may revise or alter a treaty. A very limited view of its authority under the article was taken by the Assembly whose interpretation in this instance, if always followed, would make Article 19 of little practical effect. So much is clear. What of the rest of the jurists' report? May the Assembly on its *own* initiative "advise" a revision? Is it for the Assembly to determine when a "state of affairs" has undergone "materially or morally" (what do materially and morally mean?) such "radical changes that their application has ceased to be reasonably possible?" Is the Assembly the judge? What is the meaning of "reasonably?" A host of questions arises.

These questions were raised later in the 10th Assembly after a speech by the Chinese delegate Dr. Chao-chu-wu, who called the attention of that body once more to Article 19.[71] There was no request for a specific revision as was the case with Bolivia. Following the address by the Chinese delegate, his proposal for a committee "to consider and to report on the best methods to make effective" the article in question was referred first to the agenda committee, and then to the First Committee of the Assembly[72] which took up the matter at its 7th meeting.[73] The attitude of some of the members of

[69] *Ibid.*, p. 468.
[70] *Ibid.*
[71] Records of the Tenth Assembly, p. 99.
[72] *Ibid.*, p. 101 and 113.
[73] Meetings of the Committee, Minutes of the First Committee, (Tenth Assembly) p. 44.

the committee is significant and interesting: Dr. Koch-Weser, of Germany, and General Tancjos of Hungary, strongly supported a plan for a study of Article 19, the latter referring to the Article as "the safety valve of peace,"[74] while M. Rolin of Belgium saw no need for a special committee to study the article and declared that it was designed to deal with exceptional cases only.[75] Quite logically "revisionist" states like Germany and Hungary were eager to learn the implications of a "revision" article, while a "status quo" nation was naturally cool and indifferent.

The first committee turned the proposition over to a sub-committee[76] which drew up a report interpreting Article 19 in part, as follows: "A member of the League may, on its own responsibility, subject to the rules of procedure of the Assembly, place on the agenda of the Assembly the question whether the Assembly should give advice as contemplated by Article 19, regarding the reconsideration of any treaty or treaties which such member considers to have become inapplicable, or the consideration of international conditions the continuance of which might, in its opinion, endanger the peace of the world: that for an application of this kind to be entertained by the Assembly, it must be drawn up in appropriate terms, that is to say, in terms which are in conformity with Article 19; and that in the event of an application in such terms being placed upon the agenda of the Assembly, the Assembly shall, in accordance with its ordinary procedure, discuss this application, and if it thinks proper, give the advice requested."[77]

This report made no startling contribution to the interpretation of Article 19, and as a result, therefore, of the jurists' report on the Bolivian request and the sub-committee report on the Chinese proposal, it seems proper to conclude that the Assembly may only advise, and that such advice may be given only on specific request. Initiative and final authority belong not in the Assembly, but in the individual signatory states and this was the view of the members of the First Committee who accepted the report[78] and referred it to the Assembly which adopted it without debate.[79]

A new problem was raised, however, in the first committee dis-

[74] *Ibid.*, p. 46.
[75] *Ibid.*, p. 45.
[76] *Ibid.*, p. 47.
[77] *Ibid.*, Annex, p. 99.
[78] *Ibid.*, pp. 54–56.
[79] Records of the Tenth Assembly, pp. 177–179.

cussion by M. Villegas of Chile, who asserted, "It seems possible that that action, (rendering advice)—the only possible action under Article 19—could only be taken from time to time."[80] This calls attention to a point raised by a wording in the Article: how often is "from time to time?" If too often, international order is menaced as Mr. Miller feared at the Peace Conference. The Assembly will have to decide when entertaining requests for advice in the future, whether proposals for reconsideration of the same treaty leave too little time between times. This is but one of the many issues about the Article still to be clarified.

It should further be recalled that Article 19 refers to "international conditions which endanger the peace of the world," a clause which may bring matters broader than treaty revision before the Assembly. The Sino-Japanese situation in 1931 might well have come before the Assembly under this article, upon the request of either party and if the Assembly ever achieved the authority to take action on its own under Article 19, the possibilities of the Article might well nigh be infinite. The very similar wording of Article 11 which gives almost unlimited scope for Council action in dealing with critical conditions in the world has been widely discussed and advertised, while the clauses of Article 19 have nestled in almost complete obscurity.

Article 19 is thus a "bundle of possibilities"; vast powers for the Assembly are latent in it but broader interpretations of its meaning will have to develop before the Assembly can accomplish much under its terms. Twice since 1920 the Assembly has had called to its attention, under the article's terms, two of the most knotty problems of international affairs: that of revision of peace treaties, and that of the so-called "unequal" treaties. Both times, the Assembly failed to tackle the problem squarely, reports and resolutions furnishing very strict interpretations of what the Assembly could do. That body may only give advice, when asked—such is the interpretation, to date. Questions, such as the meaning of "from time to time," as to how the Assembly in giving advice is to decide that treaties are or are not applicable, and what it is to do if the advice is not followed, remain for the future. And the fundamental question as to whether Article 19 can be of any value as long as states themselves retain the ultimate right of revision and as long as the Assembly lacks true legislative powers also must wait for later developments for an answer.

[80] Minutes of the First Committee, *op. cit.*, p. 54.

As yet, the Assembly under Article 19 has not become the "legislative" agency which is desirable for the review of international agreements, and which would constitute the second type of supervision required before the world's peace structure is firmly in place, the first type being the judicial review indicated earlier. However, it is not strange that to date the League has not ventured far along the road indicated by Article 19; the path is beset by numberless obstacles, including that eternal bug-bear, state sovereignty, and if followed, would mark a revolutionary point in international relations. The implications of and responsibilities under Article 19 are so colossal that it is no wonder that a new-born League, in a world eager for repose, should shrink from delving into highly explosive matters. What prospect is there, then, that Article 19 will be of service, particularly if narrow construction of its terms continues to prevail? Hope for usefulness in the article lies in the increased emphasis upon the need for revision; though the Assembly resolution of March 11, 1932 which condemned changes in the status quo by force was voted for without comment by such revisionist powers as Germany and Hungary,[81] and though the corollary of the renunciation of force, namely, peaceful revision, did not figure in the resolution, subsequently, reconsideration of treaties has assumed great significance in world politics and was made a prominent feature of the Four Power Pact signed at Rome in June 1933.[82] Article III of this treaty specifically recognized Article 19 of the Covenant, thus definitely making treaty revision an integral part of any general scheme for disarmament and peace. No technique for revision under Article 19 was suggested by the pact, but the mere fact of the Article's mention in such outstanding fashion is of considerable moment and may spur the Assembly to further investigations into the possibilities of the Article. Though Assembly review of a treaty, even the mere furnishing of advice, would be an epoch-making step in international affairs, would it be so very much more revolutionary than the deciding by an international body that a war was in existence when neither party had declared it or "intended" it?[83] Would it be any more of a rupture with past practise than the application of sanctions against a state for going to war? The trend of international affairs has been toward the giving of control to international

[81] *Off. Jour.*, Special Supplement 101, Records of the Special Session of the Assembly, I, 1932, p. 86.

[82] Misc. No. 3 (1933), Cmd. 4342.

[83] See Eagleton, *The Attempt to Define War*, *op. cit.*, pp. 40–45.

bodies, and to the surrendering of such hitherto fundamental rights as the declaration of war and the building of armies and navies. The dogma of state sovereignty has grown less meaningful as international organization has developed. If war rights are restricted, it seems no more radical to conceive of treaty rights limited by international supervision.

The Assembly, under Article 19, would necessarily have to proceed cautiously but even with its relatively meagre powers of giving advice, it could operate usefully in sponsoring negotiations between signatory states, some of which might be more ready to discuss revision under the auspices of an international authority than directly with the other power. To accede to a suggestion from the League for reconsideration might well be less distasteful to the national honor of a state benefiting under a treaty, than it would to appear to be giving way simply at the behest of another contractant alone, or to carry on conversations about treaty revision, might be more agreeable under the aegis of the Assembly for a disgruntled signatory afraid of the high-handed attitude of the other party, if dealt with alone.[84] In any event, action of the Assembly, under Article 19 does not seem like an absolutely hopeless prospect, particularly since the Four Power Treaty of 1933 called the world's attention to the article in clear-cut manner.

It is peace treaties, political treaties (those of alliance, for example) and "unequal" treaties, like those between China and several other states, which primarily must be thought of in connection with Article 19. These are the conventions which fundamentally determine the status quo of the world and which are the most likely to cause discord among states. These are the treaties which usually contain no time limit or provision for denunciation, other types of conventions, such as those of extradition, copyright, and commerce being usually of definite duration and of mutual advantage to all parties, and therefore being in slight need of sanctions since observance is in the interest of every participant. Treaties establishing fundamental order among states, however, are the ones for which sanctions appear to be more requisite and for which strong sanctions, those demanding the partici-

[84] M. Aramago (Bolivia) in the Second Assembly, after referring to the Chilean delegate's statement of Chile's desire for direct negotiations, said, "They have always resembled conversations between the wolf and the lamb. If Bolivia agreed to resume the conversations which have not yet been able to achieve results, it would be under the aegis and moral sanction of a high tribunal such as that represented by the League of Nations." Records of the Second Assembly, p. 468.

pation of the community of states, will be most difficult to put into operation as long as many powers are discontented members of the established system. Give these states future hope of change, furnish them with the possibility of legal release from certain distatesful obligations, and sanctions become, paradoxically, both more possible and less necessary. The greater the contentment with the status quo, the less is the danger of violent outbreak calling for sanctions.

It has been thought essential to stress the problem of revision in these introductory pages before proceeding with an analysis of the history and types of treaty sanctions, because sanctions and revision are such closely allied topics: sanctions make for order and enforcement; revision makes for change, and both are essential to a sound international community of states. As will be seen in later chapters, there are several varieties of treaty sanctions, some obsolete, others of current practical concern, but in connection with all of them, not alone with the coercive or force sanctions most stressed so far, it is hoped that the problem of revision will be kept in mind. When it has been suggested that no scheme for universal sanctions can be elaborated until revision procedure is more highly developed, it is not meant that every peace treaty must be revised or that every state must be absolutely content with the status quo. Such of course would be impossible and Utopian. What is contended, however, is that the *possibility* of revision must be opened up before sanction plans can readily be subscribed to. Perhaps the revision procedure may not need to be put to a trial; perhaps the mere knowledge that it could be would be sufficient to arouse more whole-hearted support for coercive measures.

The doctrine of treaty sanctity has, as has been described, been made more flexible in practise and in theory by the development of the habit of inserting time limits in international engagements, by the use of the doctrine of rebus sic stantibus and other principles of the law, and by the growth of machinery for periodic revision in the League Covenant and in other great international treaties. These principles and practises tend to make the problem of treaty enforcement less formidable; as long as engagements are for unlimited periods and as long as hope for release and for revision is elusive, faithful execution and ready acquiescence to obligations are more difficult to secure. Treaty sanctions, that is, the means of securing enforcement of treaties, are of vital concern to international relations, but they can scarcely be elaborated as they should be in the future if the objects of enforcement and the kind of treaties to be "sanctioned" are not

taken into account. Sanctions and means of enforcement are not of value in themselves; it is only as they operate *for* something, to procure something, that they are useful. Municipal law penalties are designed to punish the person, to prevent future violation and to protect society,[85] but these sanctions are of value only when it is clear that the person ought to be punished, that future violations should be prevented and that society needs to be protected in this fashion. These "oughts," "shoulds," and "needs," are determined by the community "sense of right" previously referred to, and the judicial and legislative processes of the community give expression to the "sense of right" in deciding when and how the laws, rules, and contracts of the community need to be enforced, modified or repealed. Enforcement and revision are two sides of the same problem of providing society with necessary regulations.

This discussion is admittedly theoretical and rather abstract to this point, but it is imperative that the larger issues be pointed out before more detailed examination is undertaken. It is not meant to imply that a highly developed sense of right exists in the world of states or that nations subscribe or fail to subscribe to comprehensive sanction schemes from high ethical motives. They consider the problem from the everyday practical and political standpoint of what each considers it needs. The sum total of these considerations of individual requirements, however, makes for a composite sense of what "ought" to be done. The United States may have proposed nonrecognition of Manchukuo as a means of preserving the "Open Door" and France may have supported the doctrine as precedent for possible future action against a Hitlerite Germany, but the net result was a world "consensus" to the effect that the Pact of Paris and League Covenant "ought" to be sanctioned in such a way. An individual nation's attitude toward sanctions is governed to a large extent by the kind of treaty that is to be enforced. When a treaty obviously confers benefits upon all—a multi-lateral postal convention, for example—sanctions become easier to insert and to apply; where, on the other hand, it is the Treaty of Versailles which is in question, coldness toward enforcement is only natural on the part of certain signatories. Historical and geographical position, as well as the nature of the treaty also play large parts in fixing an individual state's attitudes toward sanctions, but given an obviously useful treaty to all parties

[85] See Berolzheimer, F., *The World's Legal Philosophies*, pp. 372–374, for discussion and notes on penology.

even the traditional American opposition to sanctions may be overcome, as in the case of the proposed disarmament treaty.[86]

Paradoxically, the more it is believed that a treaty merits strong sanctions, the less are they required, for in such a case enforcement and obedience rest upon the strongest base possible: the recognition of the fact that the treaty is for the mutual benefit of every party concerned. Bi-lateral treaties of commerce and extradition, for example, negotiated upon an equal basis with a willingness to take on obligations which are reciprocal, need few enforcement provisions simply because both parties have an *interest* in observing the treaty. Such is not the case with peace treaties, which establish a status quo; status quo treaties never can be generally sanctioned unless there is opportunity for revision and arbitration, or unless war is eliminated and peace treaties no longer are necessary. Although treaties of manifest advantage to all parties may not require very elaborate sanctions any more than a domestic law does which has the strong support of the community, sanctions of some sort seem to be required to deter possible violation and to afford a sense of security, particularly initially, in the case of important "constitutional" treaties which lay the framework for international organization. Security requires sanctions, psychologically, at least,[87] but sanctions are not possible unless states believe that the treaty is of benefit to all, and affords room for future revision: status quo, security, sanctions, revision, and the prevention of war are all inter-connected and mutually dependent problems.

This volume has to deal for the most part only with treaty sanctions, and the effort will be made, after an historical analysis, to discover what sanctions are the most feasible and most useful for present day requirements. Though the discussion will center around sanctions, the larger issues, of which they are only a part, should not be forgotten. Enforcement without discrimination as to what should be enforced and without making room for revision would be futile.

No attempt will be made in this volume to go into the whole problem of sanctions, as only the treaty enforcement aspects will be discussed. It is true, however, that most of the plans for sanctions are and would be embodied in the form of treaties since it is a treaty which must serve as a "legislative" or "constitutional act" setting up a fun-

[86] See p. 137 for discussion of Norman Davis' pledge on consultation.

[87] Mitrany, *op. cit.*, p. 23.

damental legal framework for the world. When law was less generally embodied in treaty form, treaty sanctions and international law were not such closely allied topics as they are in these days when "international treaty legislation" tends to incorporate more and more of the rules governing international society. The problem of treaty enforcement with which this volume is concerned merges into the more general problem of enforcement of all international rules and orders; sanctions for the League Covenant, the Nine Power Pact and the Pact of Paris are not merely treaty sanctions; they are "constitutional" international law sanctions. However, forms and types of sanctions will be considered rather than details of application. Such questions as the recruiting of an international army and navy or the procedure for calling out national forces on behalf of international agencies are not dealt with. The practical and technical means of carrying out treaty sanctions of that sort must be left to more expert students.

## CHAPTER II

## HISTORY AND DEFINITION OF SANCTION

Sanction is an elusive word. A glance at any standard dictionary will suffice to show the several senses in which it is used in ordinary speech.[1] In philosophy, in sociology, in science and in law it has many connotations, and among thinkers included within any one of these branches of learning the meanings vary. This is particularly true among writers in jurisprudence and among publicists in international law who employ the term, sometimes give it definition, yet who by no means show unanimity on the subject. Jurists depending upon whether they belong to the analytical, historical, philosophical or sociological schools have assumed different attitudes toward sanctions,[2] and international lawyers in turn, depending upon how much they have been influenced by the views of any one of these schools, have stressed or minimized the importance of a sanction in the concept of law and have defined the term according to their own particular outlook.

Much of this modern diversity in interpretation may be traced back to Roman days when the Latin word "sanctio" from which according to general agreement our word sanction is derived,[3] underwent several changes in meaning and itself was a development from an earlier word form. Sanction was intimately connected with the word "sanctus" which was the past participle of the verb "sancire," to consecrate,[4] which in turn was derived from "sacer." This last was a religious term which at first seems to have been associated with the actual doom pronounced by the priest or judge on the wrongdoer. He was "sacer," devoted to the Gods below, an outlaw, an outcast whom any one might kill like Cain.[5]

The next step apparently was the extension of "sacer," now "sanctus," to cover not merely persons or things which were outlawed, but all those which were put under the special protection of the Gods.[6]

[1] *Century Dictionary* (New English) by Henry Bradley.

[2] Pound "The Scope and Purpose of Sociological Jurisprudence," *Harvard Law Review*, Vol. XXIV, No. 8, and Vol. XXV, Nos. 2 and 6.

[3] Weekley, *An Etymological Dictionary of Modern English.* 1921; Skeat, the same, 1910; *Encyclopedia Britannica.* (Fr. *sanction*, Ger. *Sanktion*, It. *sanzione.*)

[4] Skeat, Weekeley. *op. cit.*

[5] Ihering, *Geist des röm. Recht*, 5th ed. 1, 279; Muirhead, *Roman Law*, 1886. 17–18.

[6] Miller, W. G., *The Data of Jurisprudence*, 1903, 258–264; Morey, *Outlines of Roman Law*, 1885, 14–15.

These were "res sanctae" or "personae sanctae," everything and and everybody consecrated to the tutelary Gods.[7] They were sacred in the sense in which that word is used today—they were objects and persons devoted to religion and watched over by the deities, and "sancire," the verb, meant to render sacred. Among these sacred things were included the walls of the city, the city gates and boundary stones.[8] The city walls were neither to be repaired nor to be dug into without special permission and one of the alleged pretexts for the death of Remus was his interference with "res sanctae"—in his case, the city walls.[9] Sanctity also was extended to include the persons of ambassadors, priests and dignitaries of the city or state.[10]

From the notion that certain persons or things were under the special guardianship of the gods, the transition of the idea that the gods would punish any one interfering with "res sanctae" or "personae sanctae" was not difficult. "Sancire," of which "sanctus" was the past participle, took on this new shade of meaning and came at times to imply "to render sacred or inviolable under penalty."[11] The idea of a penalty, so important in the later development of the word, entered in here for the first time. "Res sanctae"[12] thus became not merely things consecrated to the divinities but objects whose violation would encounter punishment from above. The newer element of punishment combined with the original one of sacredness to give a more complex meaning to sancire and its derivatives.[13]

[7] Lindley, *Introduction to the Study of Jurisprudence*, 1855, 136.

[8] *Ibid;* Miller, *op. cit.;* Colquhoun, *A Summary of Roman Civil Law*, 1851, para. 29; *Just. Inst.* 11, 1, 10 "Sanctae quoque res veluti muri et portae civitatis, quodammodo divine juris sunt."; Couder, *Resumé de Droit Romain*, 138.

[9] Colquhoun, *op. cit.*

[10] *Ibid.;* Couder, *op. cit.*

[11] Freund's *Latin-German Lexicon.* Revised and enlarged by C. Lewis and C. Short.

[12] "Res Sanctae" are to be distinguished from sacra and profana. "Sancta dicimus quae neque sacra neque profana sunt, sed, sanctione quadam confirmata." The sacra represents a different stem of meaning shooting off from sacer, sancire, sanctus—sacra too meant holy but specifically the "sacra were the sacrifices and ceremonies by which the brotherhood of the family was commemorated." Maine, *Ancient Law*, 1st Am. ed., 185.

[13] Other ideas as to the origin of sanctio have sometimes been propounded. Some have suggested that it is derived from "sagmina," meaning the herbs which were used in the act of dedication to the gods, see Colquhoun, *op. cit.*, para. 929; Fick, II, 284 cited by Curtius *Grundzuge der Griecheschen Etymologie* 5th ed., 1879 believed *sancire* originally meant the equivalent of the German "fest machen"; E. C. Clarke in *Practical Jurisprudence*, 1883, 133 suggests that sancire was connected with the name of the god who specially presided over agreements, (sancus); Bentham *Introduction to the Principles of Morals and Legislation*, 1823, 41, note, says "According to a Latin grammerian, Servius,—the word (is) derived—from sanguis, blood: became among the Ro-

To the next stage, transition likewise was easy. Among the "res sanctae" laws, "leges" also came to be included, and "leges sanctae" meant not only that the laws were sacred but that the gods would punish the violator, just as they would take vengeance upon anyone tampering with boundary stones[14] or city walls. The notion that the laws were sacred seems to have been quite general in primitive society and it was therefore not unusual for the early Romans too to include "lex" among the "res sanctae." Maine[15] shows the intimate connection which existed between religion and law in early communities, and the curses for disobedience to the Mosaic law contained in the book of Deuteronomy evidence the fact that law and religion were closely allied in the beginnings of Jewish history.[16]

As the state, however, became more conscious of its own power, it assumed the execution of the penalty implied in "sanctus" without waiting for divine intervention[17] and "sanctus" or "sanctio" now began to acquire a particular, legal connotation. Instead of merely signifying that the law was sacred and would be upheld by religious and state agencies, it meant the particular part of the law which contained the penalty provisions. The sacred element of "sanctio" was crowded out by the penalty element, which, formerly purely subsidiary and incidental, now become of primary importance. From the legal standpoint, "sanctio" evolved as a technical legal word meaning that part of the statute which threatened the doom of the transgressor. The whole evolution of "sanctio" as a legal term from "sacer"

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mans, with a view to inculcate into the people a persuasion that such a mode of conduct would be rendered obligatory upon a man by the force of what I call the religious sanction, that is, that he would be made to suffer by the extraordinary interposition of some superior being if he failed to observe the mode of conduct in question, certain ceremonies were contrived by the priests in the course of which ceremonies the blood of the victims was made use of." The evolution suggested above, however, seems to be that most generally accepted: Lindley, *op. cit.;* Miller, *op. cit.;* Colquhoun, *op. cit.;* Ihering, *op. cit.;* Morey, *op. cit.;* Cotelle, *Abrégé du Cour Elémentaire du Droit de la Nature et des Gens.* Part I, Chap. V.

[14] Compare Deuteronomy 28, 17, "Cursed be he that removeth his neighbor's landmark."

[15] *Op. cit.*, 15 "The severance of law from morality and of religion from law belong very distinctly to the later stages of mental progress." See also Nys, *Le Droit Int.* 1912 ed., 140; Berthelet, *Les Origines de la Alchimie*, 1885; Westermarck, *The Origin and Development of the Moral Ideas*, 1908, II, 649; Korkunov, *Philosophy of the Law*, 2nd ed., 161. (trans. by W. G. Hastings.)

[16] Deut. 28, 38, "If thou wilt not observe to do all the words of this law that are written in this book, that thou mayest fear this glorious and fearful name, the Lord Thy God."

[17] Morey, *op. cit.*

and "sanctus" was an elimination process whereby the threatened penalty implication in "sanctus" detached itself gradually from the more general sacred element and eventually stood alone as the penalty provisions of the law.[18] These provisions usually were placed at the end,[19] and thus the final paragraph of a "lex" was the "sanctio." Perhaps the best known example of this is found in the law conferring "imperium" upon the Emperor Vespasian, 69–70 A.D. in which the "sanctio" at the close outlined the penalties for infraction.[20]

But this was not the end. Not only did "sanctio" mean the penalty section of a law but in certain instances it came to mean the whole law itself—not that the "lex" was "sancta" as in the earlier meaning already discussed,[21] that is protected by the gods and later by the state, but it was a "sanctio." Such were for example the "sanctiones pragmaticae" which were ordinances of the emperor granting constitutions in response to the requests of a city or province,[22] and these usually pertained to police matters and local problems of justice. Herein is seen a new element in "sanctio," one that means an authority or approval; from being associated so long with prohibition and with penalties, it came to signify also an authoritative grant or permission. This was its latest meaning.[23]

To the Romans, then, of imperial times, "sanctio" seems to have become quite separate from its religious parent, "sancire," and to

[18] *Justinian Digest*, 48, 19, 41. "Sanctio legum quae novissime certam poenam irrogatiis qui praeceptis legis non obtemperaverint ad ias species pertinere non videtur, quibus ipsa lege poena specilliter addita est: nec ambigitur, in caetero omni jure speciem generi derogare. Nec sane verisimile est delictum unum eadem lege variis aestimationibus coerceri. . . ." *Institutes*, II, 1, 10 "Legum eas partes quibus poenas constituimus adversus eos qui contra leges fecerint, sanctiones vocamus." Ulpian, P. 1, 8, 9, 3 "Ut leges sanctae, sanctione enim quodam sunt subnixae." See also Miller, *Data of Jurisprudence* 1903, 258.

[19] Mömmsen *Romisches Strafrecht*, IV, 11, 14. "Die Schlussklausel der Gesetz (sanctio) entband nicht bloss regelmässig den, der in Befolgung dieses Gesetzes ein anderes verletze, von der in diesem festgesetzen Strafe, sondern belegte auch häufig mit einer Strafe, meistens wohl einer Mult denjenigen, welcher, abgesehen von den, in diesem Gesetz hauptsächlich enthaltendem speciellen Strafsatzen, den hier ausgesprochenen allgemeineren Bestimmungen zuwiderhandelt."

[20] Girard, P. F., *Textes de Droit Romain*, 1903. "Sanctio: Si quis huius legis ergo adversus leges rogationes plebisve scita senatusve fecit fecerit, sine quod eum ex lege rogatione plebisve scito senatusve consulto facere oportebit, non fecerit huius legis ergo, id ei ni fraudi esto, neve quid ob eam rem populo dare debeto, neve cui de ea re actio neve judication esto, neve quis de ea re apud se agi simto."

[21] See page 43.

[22] *La Clef des Lois Romaines ou Dictionnaire*, 1810.

[23] Skeat, *op. cit.;* Miller, *op. cit.;* Esmein *Eléments du Droit Const.*, 1928, Vol. II, 68 *et seq.*

have meant two things in law, first that portion of a "lex" which prescribed the penalties and, secondly, at times, the whole law itself as was the case with the "sanctiones pragmaticae." Because of the later discussions about the meaning of "sanctio" it is important to note here that "sanctio" to the Romans seems never to have meant the penalty itself. The term referred to the clause containing the penalty which is a very different thing.[24] The Roman used "poena" when he spoke of a penalty and carefully distinguished it from "sanctio" which was used to indicate a section of the statute.[25]

This rather technical term, "sanctio," appears to have been lost sight of during the Middle Ages. Law as a purely secular, mundane thing ceased to be so much an object of study, and written law, of which "sanctio" was a part, suffered an eclipse.[26] Law was custom.[27] Whenever there was speculation as to its nature it was regarded as intimately connected with religion, and the Patristic writings were heavily relied upon for reasoned framework. God was "Aequitas"; this principle fixed in man was "Justitia" and "Justitia" expressed as law was "Jus."[28] Direct connection between God and law was thus held to exist and any rule which was counter to divine "Justitia" was not law.[29] With the absence of written law and with the regard for law as emanating from God and thus closely allied with religion, it is not surprising that "sanctio," a product of the secular written law of Rome, should not have been in use and that references were made instead to "sancire," in the sense of consecration under penalty. Thus St. Isidore of Seville uses "sancire" without referring to "sanctio."[30] In neither Gratian's famous Decretum of 1154,[31] the basis of Canon law, nor in Thomas Aquinas[32] does the use of "sanctio" occur in the later Roman sense, though in both, law is spoken of as something sanctioned by the elders and the people.[33] Here sanction is used in the

[24] Clarke, *op. cit.*

[25] *Just. Institutes*, ii, 1, 10; Mommsen and others: see page 44.

[26] See Carlyle, *History of Political Theory in the West*, Vol. III, Chap. 6.

[27] See Dickinson, John, *Administrative Justice and the Supremacy of Law*, 85.

[28] Carlyle, Vol. II, Chap. 1. See Hooker, *Ecclesiastical Polity*, I, Chap. XVI.

[29] *Ibid.*, Vol. II, Chap. 2; Aquinas *Summa Theologica, De Lege.*

[30] *Etymologies*, Bk. xv, Chap. 1, v, 2. "Sancire autem est confirmare et irrogatione poenae ab iniuria defendere, sic et leges sanctae et muri sancti esse dicuntur."

[31] *Distinctio*, ii, "lex est constitutio populi secundum quam maiores natu simul cum plebibus aliquid sanxerunt."

[32] *Summa Theologica, De Lege*, Question ac art. 3. Same as in the "Decretum" which is based upon a statement in Isidore's *Etymologies*, Bk. v.

[33] *Ibid.*

sense of an authoritative grant or permission with the element of penalty held in the background; "sanctio" as considered by Ulpian, Gaius and the writers of the Institutes is not in evidence. It seems clear too that "sancire" or "sanctus" was never identified with actual penalties. Aquinas speaks of laws being sanctioned but he used "poenae" for penalties exactly as the Romans did.[34]

Fortescue writing about two centuries later used the word sanction as an enactment, sacred in character, which commanded what was right,[35] a view quite in line with much of Roman and most of medieval theory that true laws were divine. To the early Romans laws were "sanctae"; Cicero, Seneca[36] and the jurists, influenced by the Stoics, wrote of Natural Law as something common to all men discoverable by reason, and the Christian fathers merely identified this law with the law of God. Law was held to be based ultimately upon some sort of an eternal rightness.[37] It is true that Roman Civil law was secularized and "sanctio" evolved as a technical legal term no longer closely associated with sanctity or rightness,[38] yet the etymology of the word shows the relationship with the element of sacredness which could never be entirely shaken off. "Sanctio" even when it was used as a term for a particular portion of a "lex" never meant merely a penalty.[39] Behind it always was the idea that what contained the penalties was a righteous sacred thing and that whatever the penalties they were to be just ones well merited by the transgressor. The conception of law as being based upon eternal justice continued through all the natural law school[40] and survives today in the French "Droit" and the German "Recht";[41] only in the Anglo-Saxon view that "laws are those rules enforced by the courts"[42] is the idea of a fundamental right behind legal rules really lost sight of. It was in connection with law as a sacred thing that the word "sancire," from which "sanctio" and sanction are derived, was first employed. It is a normative word.

[34] *Ibid.*, Dickinson, *op. cit.*, 84–89.

[35] *DeLaudibus Legum Angliae*, Chap. III. "All human laws are sacred;—It is an Holy Sanction commanding whatever is honest and forbidding the contrary."

[36] Maine, *op. cit.*, 58–59; Carlyle, *op. cit.*, Vol. I, Chap. 1.

[37] *Ibid.*, Dickinson, *op. cit.*, 84–89.

[38] "The Romans made much . . . of natural law; but at the time of the invasions they had come to recognize positive law as deriving its authority from the will of the emperor, that is, as we should say, from the government," Dickinson, *op. cit.*, 85.

[39] See page 45.

[40] See Esmein, *op. cit.*, 294–303; Dickinson, *op. cit.*, Chap. IV.

[41] Krabbe, *Modern Idea of the State*, trans. by Sabine and Shepard, 7, 49–50.

[42] Salmond, *Jurisprudence*, 9.

The various meanings of "sanctio" and sanction in Roman and medieval days may give some clue as to the reason for the variety of definitions and usages given to the word in the last century or two. "Sancire" meant to consecrate, then to declare sacred under a penalty; next, "sanctio" developed as a special term for a part of a law and finally acquired the meaning of authoritative grant or permission. Medieval writers used "sancire" in the consecrate under a penalty sense and also in the final Roman meaning of authorization and allowance. All these shades of interpretation have come down to us, and others have been added. In law, the penalty connotation has been the most consistently influential and has led to many variations and elaborations. The early influence of "sacer" and "sanctus," however, has, but for a few exceptions to be noted later, kept "sanctio" from meaning the actual penalties themselves and has preserved it in a broader sense in which the whole purpose or object of the penalties has been included. Sacredness, penalty, inducement, motive and means of enforcement were intertwined in the meaning of sanction. The fear of penalties served as an incentive to obedience and thus acted as a means of enforcing the law which was considered sacred in character. Fear, threat, motive—all psychological factors were involved in addition to the concrete, objective penalties themselves.

The necessity of providing an inducement to law obedience has been felt from earliest times. Aristotle[43] spoke of it and law makers everywhere in all ages have attempted to accompany their enactments with threats or rewards. Such were the "sanctiones" of Roman laws—they were the portions of the law which offered penalties for disobedience.

In modern times writers in ethics and morals, and jurists and publicists have adopted different views of sanctions which may be traced back to the various elements of "sanctus" and "sanctio" as they existed in Roman days. In both ethics and law a cleavage may be noticed between those who stress the psychological, subjective factor, and those who emphasize sanction as something rather more objec-

[43] *Ethics*, Bk. x, Chap. 9. "For it is not the nature of the masses to obey a sense of shame, but fear; nor to abstain from vicious things because it is disgraceful, but for fear of punishments,—we should want laws relating to the whole of life, for the masses are obedient only to compulsion rather than to reason, and to punishments rather than to the principle of honor." Spinoza, *Tractatus Politicus*, I, 5. "We have seen that the way pointed out by Reason herself is exceedingly difficult insomuchso that they who persuade themselves that a multitude of men—can be induced to live by the rule of reason alone are dreamers of dreams and of the Golden Age of the Poets."

tive. Further, under both these groupings subdivisions exist. Only a brief glance into the field of ethics will be made in order to make plainer the diversity which exists.

## Ethics

The Utilitarians have linked sanctions with motives to obedience to a moral or legal rule, that is, with the hopes or fears of pleasures and pains for conformity or non-conformity. In his "Introduction to Morals and Legislation,"[44] Bentham wrote, "a sanction then is a source of obligatory powers or motives, that is, of pains and pleasures" and John Stuart Mill spoke of "the ultimate sanction—of all morality—being a subjective feeling in our own minds."[45] Others, however, like Fowler,[46] call the pains and pleasures themselves, not the fear or the hope of them, sanctions. Calderwood[47] stated that "sanction is a confirmation of the moral character of an action which follows it in experience" and Leslie Stephen[48] considers a moral sanction "as a remote consequence of a line of behavior tending by natural selection to reinforce certain instincts." Ethical writers have made classifications of various kinds of sanctions like Bentham's physical, moral, political and religious, and Mill's external and internal, but a division remains upon the line of objective and subjective, and even here the boundary mark is not distinct. The fear of a pain could not very well last unless such pains had been known to exist, and the displeasure by itself could not have much effect unless there were real dread of it, so that perhaps both go into the meaning of sanction, which, as suggested in the consideration of Roman etymological origins, is a complex word, susceptible to various interpretations. Sanc-

[44] 1823, Chap. III. Also *Principles of Legislation*, III, para. 2. There are four distinguishable sources from which pleasure and pain are in use to flow—the physical, the political, the moral and the religious. And inasmuch as the pleasures and pains belonging to each of them are capable of giving a binding force to any law or rule of conduct, then may all of them be termed sanctions."

[45] *Utilitarianism*, Everyman ed., 26. He further classified sanctions as external and internal, the external being "the hope of favor and fear of displeasure, from our fellow creatures or from the Ruler of the Universe," while, internal "is a feeling in our own mind; a pain more or less intense, attendant on violation of duty." *Ibid.*, 25–26. Both types, however, are internal in the sense that they are subjective, the so-called external sanction being merely a fear (or hope for) of an outside reaction.

[46] *Principles of Morals*, II, iii, 144. "Physical sanctions are the pleasures and pains which follow naturally on the observance or violation of physical laws; the sanctions employed by society are praise and blame, etc."

[47] *Handbook of Moral Philosophy*.

[48] *Science of Ethics*, X, i, 2.

tion in ethics has to do with the rules of right conduct, the motives for compliance therewith and the consequences of violation, and ethical thinkers and writers select for themselves the particular shade of meaning most adaptable for their outlook. The varied elements date back to Rome; the modern writer fits them in or shifts them about as he sees fit.

## Law

In the legal realm an equal diversity of opinion as to the meaning of sanction and as to what sanctions are has long been in existence. Classification of sanctions as legal, social, moral, religious and political have been made by several jurists[49] but it is the nature of a legal sanction that is of concern here. The simplest and most precise views are those held by the Analytical School. As the penal provisions of the Roman "lex," "sanctio" has been taken over by them and defined usually as the actual penalties prescribed by the state for the violation of a legal rule. Since "sanctio" was an integral part of written law backed by the state, it seems only natural that those jurists who stress law as a command and who regard legislation by a sovereign authority as the only true form of law should adopt sanction as it was used when Roman law had developed to its written secular stage. The analytical jurists, however, have given sanction a twist of their own for, as before pointed out, "sanctio" to the Roman was not synonymous with the penalties or decreed consequences of infringement.

The analytical view of sanction was clearly expressed by Austin who defined it as "the evil which will probably be incurred in case a command be disobeyed or (to use an equivalent expression) in case a duty be broken."[50] Blackstone previously had regarded sanction in almost the same light, defining it also as "the evil that may attend the breach of public duties."[51] A legal sanction was a penalty set by a human legislator for the violation of a command. There was a duty to obey that command and sanction was the prescribed evil for a breach of that duty. Command, duty, and sanction were to Austin inseparably connected terms.[52] He also distinguished moral and religious sanctions as the evils for the violation of moral laws or the law of God but objected to Bentham's use of "physical sanctions" as the

[49] See Hoffman, *Legal Outlines*, 1848, Lecture VII, pp. 279–284; Markby *Elements of Law*, 4th ed. 1889, 412.

[50] *The Province of Jurisprudence Determined*, 2nd. ed. 6.

[51] *Commentaries*, Bk. IV, Chap. 5, 67.

[52] *Op. cit.*, 9.

result of a man's being negligent about the care of his house or property. A sanction was something suffered as a consequence of not complying with the commands of intelligent, rational beings or Being, and not a mere consequence of violating the ordinary rules of prudence and common sense.[53]

This relatively narrow idea of a legal sanction as the penalty or harmful consequences for violation suggested in a law by the legislator has been adopted by the followers of the analytical Austin. Emphasis was placed upon state action and the physical power of the state behind the law. Sanction was stripped for the most part of any sacred connotations and laid bare as the penalty exacted by the community, organized as a state, for the violation of the commands issued by its sovereign authority. To the analytical jurist sanction implies state enforcement of statutes through courts and policemen; it becomes definitely identified with state power and authority. Thus Holland declared that "the real meaning of all law is that unless things proceed in the manner prescribed by it, the state will, either of its own accord or if called on, intervene. This intervention of the state is what is called the 'sanction' of law,"[54] and W. G. Miller explained sanction as "the physical form of state approval and interference."[55]

Salmond refers to sanction as "the instrument of coercion employed by any regulative system"[56] and finds a legal sanction in physical force applied by the state.[57] He was careful, however, to distinguish

[53] *Ibid.*, 165–166. If such were the meaning of the term, he said, it "would then comprehend every possible evil which a man may bring upon himself by his own voluntary conduct." Both Blackstone (*Commentaries*, 56) and Austin (*Prov. of Jur. Det.*, 8–9) discounted rewards as sanctions.

[54] *Jurisprudence*, II, ii.

[55] *Op. cit.*, 258–264.

[56] *Op. cit.*, 11.

[57] *Ibid.*, 12. Other definitions of sanction in a somewhat similar manner are: AMOS, *The Science of Law*, 1874, 32–33. "The force of law depends upon the physical pressure or 'sanction' which is always ready to support it." Edward POSTE'S *Commentary on Gaius*, 1890, 2, "A Sanction is the evil annexed to the command of a lawgiver"; BLACK, H. C., *Law Dictionary*, 2nd ed., 1910, "Sanction is a penalty or punishment provided as a means of enforcing obedience to law. A law is said to have a sanction when there is a state which will intervene if it is disobeyed or disregarded. Therefore international law has no sanction." CLARKE, E. C., *Practical Jurisprudence*, 1883, 133, "I do not think sanctio ever means, like our modern sanction, simply the penalty itself." SIDGWICK, Henry, *The Elements of Politics*, 273, "Sanctions are the penalties attached to the law's violation; CALVO, C., *Dictionnaire de Droit International*, 1885, "En jurisprudence la sanction est la disposition inséré dans une loi—qui assure l'accomplissement régulier des conditions, en attachant quelque pénalté à la non-execution." BRADLEY, Henry, *op. cit.*, "Sanction is the specific penalty enacted in order to enforce obedience to a law." MARKBY, *op. cit.*, "Sanctions set by the law are legal sanctions."

sanction from mere penalties in the narrowest sense, for he remarked that "sanction is not necessarily a punishment or a penalty; that is only one way. A Rule of Right is enforced not only by imprisoning the thief but by depriving him of his plunder and restoring it to the owner; each is an application of sanction by the force of the state."[58] This brings up for consideration the fact that these sanctions, these injurious consequences of illegal action which the state will impose by the sheer might of its power, may be of several sorts; they may be imprisonment, death, fines, i.e., penalties in a strict sense or they may be what are known as sanctions of nullity. Laws with such sanctions have sometimes been called "perfect."[59]

Whether the law violator suffers imprisonment or fine or sees his action nullified, he is penalized or thwarted by the state and this state action behind the law is the essence of legal sanction from the analytical point of view. Where the remedial measures which the state is to carry out in case of infringement are embodied in the law itself, those measures are the sanction of that law, and furthermore they are necessary to make that law real law. As Austin said, law is a command, and command, duty and sanction are inseparably connected.[60] Hence according to the Austinian conception any rule which did not contain specific evils which a definite authority would impose upon a violator would not be called law, and he came to the conclusion that because international law lacked a legal sanction as he defined it, it was not law but "positive morality."[61] International law he admitted was enforced by "moral sanctions," chiefly fear of other

[58] *Op. cit.*, 12; Austin had said, *op. cit.*, 6–7, "punishments . . . are only a class of sanctions."

[59] Korkunov, *op. cit.*, 188, "The laws which have as their sanction the inefficacy of acts which violate them are called perfect.—The acts may be absolutely null at law or they may be only voidable.—They are absolutely null when that is the result decreed as a consequence of the non-observance of the law." Holland, *op. cit.*, "It is a virtual punishment to a wrong-doer or to one who neglects to comply with prescribed courses of procedure if his wrong be merely undone, or his faulty proceedure fails of its effect; he has as the saying goes, his trouble for his pains." See Austin, *op. cit.*, 5th ed. 1875, 27 and 505–506. Gaius, (trans. by W. G. Miller), 359, 260. "A statute is either perfect or imperfect or short of perfect. It is perfect when it forbids something to be done and if done, rescinds it; that is imperfect which forbids a thing, yet if done neither rescinds it nor imposes a penalty on the contravener—Short of perfect is that which forbids a thing and if it be done does not rescind it but imposes a penalty on the contravener." *Comp. Ulpian* I, 1 "—minus quam perfecta lex est quae utat aliquid fieri et si factum sit non rescindit sed peonam inuingit ei qui contra legem fecit."

[60] See page 49.

[61] *Op. cit.*, 177; see Holland, *op. cit.*, 1893 ed. 339, "International law is the vanishing point of jurisprudence."

nations and of war, but these were not legal because they were not measures enforced and executed by a determinate authority.

Sanction in the fullest sense has been shown to have many meanings dating back to Roman usage, and when he spoke of moral sanctions, such as fear of war, Austin was employing the term in rather a broad manner, not merely as something objective backed by the physical pressure of an organized political community but as a psychological subjective thing, that is, a fear, operating as an inducement to abide by a moral rule. The fear of evils contained in a statute of course serves as a motive for compliance with a legal rule, but Austin did not use legal sanction in that fashion. He defined it instead as the actual evil itself, not the fear of it, and made sanction a much less subtle term. He simplified it, just as the Roman "sanctio" was a definite, concrete part of a "lex," but the word sanction itself has never to all implied something purely objective and the question arises whether legal sanction necessarily has to have the very restricted meaning which Austin and his followers gave to it.

Why confine legal sanction to actual penalties specified by the law itself? Why exclude as "legal" all the means used to induce men to observe a legal rule, except those specified in a statute? The declaration that the state will take certain steps prescribed in the law itself may be only one kind of legal sanction which might take many forms as Pollock says "from obscure monitions of conscience to—acts of violence."[62]

The Austinian view of legal sanction as essential to law has been of great influence in legal philosophy and has profoundly affected the publicists of international law who have had to take a stand for or against the analytical view in discussing their subject. Before considering the strictly international law point of view, however, the reaction of the Historical School in jurisprudence must first be mentioned for it too has strongly colored the outlook of many toward the law of nations.

Whereas the analytical lawyer sees chiefly force and constraint behind legal rules and finds the sanction of law in enforcement of specific evils by the courts and police powers of the state, the historical jurist finds "chiefly social pressure behind legal rules. Sanction is found in habits of obedience, displeasure of others, public opinion and a social standard of justice."[63] These sanctions would not be legal in

[62] *A First Book of Jurisprudence*, 1896, 22–25.
[63] Pound, *op. cit.*

the Austinian sense, they would be moral and social, but the great point of the historical lawyers, led by Savigny,[64] Maine[65] and Pollock[66] is that law is not essentially a command backed by state force and that legal sanction of the Austinian variety is not a necessary part of law. They consider law as found, not made,[67] and point out the modernity of law enforcement by the state; law in the beginning was custom, before there was any state, and it was law even though it had no Austinian legal sanction connected with it. The whole analytical insistence upon the state, upon law as a conscious command, and upon sanction as the evils decreed by the sovereign for disobedience was swept aside by the historians who, like Pollock, declare, "Law tends to become identified with the will of the state (but) law is enforced by the state because it is law; it is not law merely because the state enforces it."[68] Maine minimized the importance of penalties attached to a rule and asserted that men do not always obey rules from a sense of fear. "The largest number of rules which men obey are obeyed unconsciously from a mere habit of mind."[69]

More recent writers like Duguit and Krabbe have discriminated sharply between state authority and the authority of law. Duguit regards laws as the rules of conduct binding upon men who live in society. These rules are not decreed by any political authority but arise naturally from the conditions of social life and the sanction is

[64] *System des Heutigen Römischen Rechts*, I, para. 11.

[65] *International Law*, Lecture II; "In early societies sanctions are of a moral character coming from reverence for the Gods, custom and public opinion, or else—coming from private vengeance or royal will", Also see *Early History of Institutions*, Lect. II, 30.

[66] *Op. cit.*, 22–25.

[67] Savigny "Vom Beruf unsrer Zeit für Gesetzgebung und Rechts-wissenschaft," 3rd ed. 8,—"law grows as the people grow, develops with the people and declines when the people lose individuality.... Throughout, it is the result of inner, silently working forces, not of the arbitrary will of a law-giver."

[68] *Op. cit.*, 26–27.

[69] *International Law*, 50. Jurists of the philosophical and sociological schools join with the historians in opposition to the view of law as a command with legal sanctions as penalties enforced by the state (Pound, *op. cit.*, parts 2, 3, and 4). IHERING, *Der Zweck im Recht* (trans. by I. Husik, 1913) Chap. VIII, Para. 10. "The legal character of international law—cannot be an object of doubt.—Coercion (is) an essential requirement of law but with this must be combined the knowledge that the organization of it in (some cases, e.g., international law) meets with obstructions which cannot be overcome. The organization of coercion cannot keep pace with the legal rule." KORKUNOV, *op. cit.*, Para. 12. "Constraint is neither a fundamental nor even a general attribute of juridical phenomena.—We can conceive of law without this attribute. If society were composed only of perfect men constraint would be superfluous and unknown.—Law would exist none the less for in order to fulfill my duties—I must know wherein my duties consist."

primarily psychological. It resides in the individual consciousness of the approval or disapproval of society.[70] Krabbe asserts that law arises not from the order of a sovereign authority but from the sense of right of the community. "Not the will of a sovereign who exists only in the imagination, but the legal conviction of the people lends binding force to positive law; positive law is valid therefore only by virtue of the fact that it incorporates principles of Right."[71] Sanction for one part of the legal system, "that under which the people live", is "in that branch of the administration which enforces punishments and executions, while the sanction for the performance of administrative law lies in the personal advantages which those charged with the administrative duty derive from its performance."[72] Vinogradoff also declares that law and sovereignty are not of necessity inseparable, for "enforcement of legal rules does not necessarily depend upon the existence of indisputable sovereign authority.[73]

The ideas of historical and philosophical jurists make the subject of sanctions far more intricate than the analytical lawyers would have it. Law for the anti-analytical thinkers may still be law without "legal" sanctions, and furthermore, it has other sanctions, as even Austin conceded, which are of different sorts. The stress of those opposed to Austin upon the psychological factor may be seen particularly in Krabbe and Laski, and all those referred to as taking contrary views to those of the Austinians bring in vague intangibles like sense of right, public opinion, and social standards of justice as sanctions of legal rules. Jurists thus divide into two main groups on this topic, those on the one side being the analytical lawyers who conceive of law as the command of a sovereign authority, with the support of the force of that sovereign (legal sanction) as an essential ingredient of that law, and those on the other being the philosophical, historical

[70] For views of Duguit see his *L'Etat, le Droit Objectif, et la Loi Positif*, 1901, *Manuel de droit Constitutionnel*, 2nd ed. 1911; *Transformations du Droit Public*, 1913. For discussion see Elliott, *The Pragmatic Revolt in Politics*, 1928, Chap. IX.

[71] *Op. cit.*

[72] *Ibid.*, 126; See also Laski, *Studies in the Problem of Sovereignty*, 14, "There is no sanction for law other than the consent of the human mind. It is sheer illusion to imagine that the authority of the state has any other safeguard than the wills of its members." Comp. Grotius, *De Jure Belli ac Pacis*, III, 25, 1 on the ultimate sanction as the good faith of the society to which the rules apply.

[73] *Outlines of Historical Jurisprudence*, 1920, 359. "The sanction is desired and produced by public opinion, sometimes by indirect means, sometimes by private help, and sometimes by pressure from the tribe.—Will the state step in and use direct coercion against the recalcitrant individual? It will not do so in tribal society."

and sociological jurists along with many publicists who think of law as the rules and customs of a community,[74] supported by sanctions of a moral or sociological nature, those rules and customs being not necessarily the conscious commands of a determinate political organ. For this second group, law may be independent of the state and international law may be law though it lacks the Austinian "legal" sanction. The Austinian concept was and is simple and precise and very attractive when law by coercive legislative enactment has been well developed, but for the international lawyer particularly, its view of the legal field is unduly limited.

It is interesting to note, too, that many of those opposed to Austin swing back to the idea of law as something right, e.g. Krabbe's emphasis upon "sense of right." By Austinian definition any command of a sovereign is law, whether it is right or not, ethics and law being quite separate. This is a break from the older views of law as divine, of "leges sanctae," of law as "Jus," and many of the opponents of Austin give importance to what they consider the very proper connection between law and morality or law and right. This right may not be absolute and eternal but at least a link is made between law and what a community conceives to be right.[75] Law is more than a mere command; it has to do with the standards and social needs and interests of the community.[76] With law as something more than a command, the sanction for law comes to have a moral connotation again. It is not simply a penalty or evil imposed by state force; it has an idea of "rightness" in it, of justice from the community point of view which takes it back to the original meaning of "sancire" as consecration with divine protection. When a sanction in the social standard of justice is said to exist, sanction for law is a whole moral world away from Austin's "legal" sanction as sheer state coercion.

With so many varying ideas of sanctions among jurists, all the

[74] For this emphasis of community as opposed to state see particularly Oppenheim, *Int. Law* 3rd ed. I, 6–12; Krabbe, *op. cit.*, Chap. X, Dewey, *The Public and its Problems*, 153.

[75] Dickinson, *op. cit.*, 113–114.

[76] See Jellinek's conception of "law as minimum ethics" in "*Die Social-ethische Bedeutung von Recht, Unrecht und Straf*, 42 and the guarantee for law as mainly moral, resting upon the law-abiding habits, the public opinion of the community, in *Recht des Modernen Staats*, 2nd ed. 325 *et seq.*

For discussion of earlier opposition between law and morality see Korkunov, *op. cit.*, 57–59; Stammler's, *Wirtschaft und Recht*, and *Lehre von den rightigen Rechte*, 1902, for theory of justice through law; Kohler, "*Einfuhrung in die Rechtswissenschaft*" 1902, for interpretation of law as the product of the whole community; Ihering *Der Zweck im Recht*." for a teleological view of law—law as a social means.

way from Blackstone's "evil for disobedience" to Duguit's psychological "individual consciousness of disapproval" it may seem an act of undue temerity to attempt to give a definition of sanction nowadays that will not only have reference to what these various writers have meant but which will also be of use in international law, for treaties particularly. Many have written outlining what they believed the sanctions to be without explaining exactly what they thought a sanction was. Those who have written on the topic, though, for the most part speak of sanctions in connection with law enforcement and it is from that angle that a workable definition may be approached.

City walls, individuals and laws were declared "sanctae" in Roman days as a means of keeping them inviolate. They were made sacred with a hint of retribution for interference or infraction. The "sanctio" of the Roman "lex" was inserted as a means of insuring enforcement through fear of punishment by the state. Modern definitions hover around this idea of enforcement of obedience. The Austinians in narrowing legal sanctions to specific evils or penalties did not lose sight of the object of those penalties. "They imply, if they do not express, an intimation that their (the laws) author will see to their being obeyed," said Holland.[77] They are what are "ready to support the law" said Amos.[78]

Korkunov has stated that "it is necessary to constrain the man to the observance of legal rules.—These means of constraint are sanctions."[79] According to Hoffman sanctions "are the prospective pains or pleasures that lead men to act or to refuse to act," they are what make for obedience or enforcement.[80]

Sanctions as the methods or means of securing enforcement are apparent in the definitions of publicists. Cotelle called them "juissons particulières qui a pour objet d'assurer l'execution de la loi."[81] Kebedgy spoke of sanction "dans un sens large, non seulment au point de vue des conséquences de l'inobservation mais aussi au point de vue de ce qui empêche leur violation"[82] and Calvo called sanction "la disposition—qui assure l'accomplissement regulier des conditions."[83]

[77] *Jurisprudence*, II, ii.
[78] *Op. cit.*, 32–33.
[79] *Op. cit.*, Para. 26.
[80] *Op. cit.*, Lecture VII.
[81] *Abrégé du Cours Elémentaire du Droit de la Nature et des Gens*, 18–80, Part I, Chap. v.
[82] *Revue de Droit International*, xxix, 113–125.
[83] *Dictionnaire de Droit International*, 1885.

Hershey talks of a "physical sanction to enforce the law"[84] and in fact all the writers who have been mentioned in the previous pages speak of sanctions and methods of enforcement together. They all appear to have in mind the manner in which law is enforced when they discuss sanctions, and the definition may be hazarded that sanction of law signifies the means of ensuring enforcement or the means of inducing observance of law.[85]

This definition would include the "legal" sanctions of Austin, namely, evils or pains inflicted by the state, for they constitute one method of enforcing the law. It would include the psychological factors such as fear of state action and fear of public opinion. Such subjective fears make for law observance. The sense of right of the people, the standards of justice in the community also would be sanctions closely connected with the original meaning of "sancire." These standards and feelings for right make for law observance, though only for laws which conform to the sense of rightness. The individual would tend not to break them because he would be acting against his sense of justice; he would have his own conscience to settle with. Such standards would not be sanctions for an arbitrary command of the state which might conflict.[86] It has often been found that penalties imposed by a sovereign are inefficacious sanctions, that is means of ensuring law enforcement, when the community sense of right refuses to support such legislation. Undoubtedly, as Laski says,[87] the ideal sanction of law is the sense of right as manifested by common consent, for there the masses feel that the law is good and will observe it not because it may have Austin's legal sanctions, courts and policemen, tacked on to it. Sanction in this sense, that is community acceptance, conformity to the community's standard of justice, contains a strong element of the original meaning of "sanctus" as sacred, right and just, a meaning which was considerably altered by Austinian usage, but which even there was connected with law enforcement and duty of obedience.

[84] *Essentials of International Public Law and Organization*, Revised ed., 8.

[85] *Dictionary of Philosophy and Psychology*, D. M. Baldwin, editor. "Sanction of law—that by which law is enforceable." Black, H. C. *Law Dictionary*, "Sanction is a penalty or punishment *as a means of enforcing obedience to law.*"

It may be noted that Burlamaqui, *The Principles of Natural and Politic Law*, 7th ed. 1859, 74, defined sanction in the Roman sense of sanctio: "Sanction is that part of the law which includes the penalty enacted against those who transgress it."

[86] See Webster's argument in *Dartmouth Coll.* v. *Woodward*, *Works*, v, 487; Dickinson, *op. cit.*, 121.

[87] See page 54, note 72.

Thus a law may have all kinds of sanctions. Where the sanction of state authority is behind a law which also is supported by the whole community, that law is most strongly sanctioned and should be easily enforceable. A law backed by state force alone against the wishes of a community is apt to be weak; likewise a law lacking the organized coercion for its support is not likely to be as strong as the more ideal where organized force plus community acquiescence combine to uphold the legal rule. This last point in regard to international law will be discussed in the next section.

Sanction is not a simple term. It implies more than penalties. The fear of those penalties operates as a sanction so that the meaning must be extended to comprehend all the means by which law observance is induced or enforced. A law may lack a legal sanction in the Austinian sense, but, as Pollock remarked, "There is no law without a sanction. The sanction may be remote and improbable perhaps but the mere apprehension of redress is a sanction."[88] All these means of assuring law observance are "legal" in the sense that they support a law. They may be moral, religious or social to an Austinian but they are none the less sanctions of the law.[89] The term legal as Austin used it seems too narrow; state punishment and coercion is only one sanction of the law suited to one type of law and as used in the Austinian manner it meant the exclusion of other rules as legal. A municipal lawyer may accept the Austinian view but an international lawyer cannot if he wishes to regard his subject as a true branch of law. He may accept Austin's definition of legal sanction, but he cannot agree to the proposition that such a legal sanction is essential to all law. His law may not possess these legal sanctions, but it is law and it has sanctions whether they be classed as moral or social or legal in the broad sense suggested above.

Sanctions as the means of ensuring law observance, therefore, include many factors, psychological and subjective, external and objective. The subjective fear of harmful consequences, whether a penalty to be inflicted by the state or whether merely the disapprobation of society, and these consequences themselves, objectively considered, operate together to make the sanction, that is, the method of enforcing the law. The law may be enforced either by the individual's

[88] *Op. cit.*, 24–25.

[89] "Strictly speaking all legal sanctions are included in social sanctions which comprehend not only ridicule, public blame and praise—but also such penalties as fines, imprisonment and death inflicted by common consent and concerted action." *Baldwin's Dictionary.*

disliking to act counter to what he thinks is right or by his fear of penalties. Sanction involves an alternative for the individual: he may go counter to the law against murder, but if he does he knows that he may suffer anything from twinges of conscience to a death penalty. His sense of right, his dread of penalties, may both be sanctions: they are what make for law observance. They are what induce conformity to the legal rule.[90] As before stated, motive, fear, pain, penalty, sense of right are all involved as elements, various writers having stressed now one now another. All together they operate to bring about obedience to law, and sanction becomes an inclusive term.

[90] See *Century Dictionary*, "Sanction is the knowledge of a fact in the external world which will result from an act either always or in the long run and so produce pleasure and pain—inducement to do or to refrain."

## CHAPTER III

## INTERNATIONAL LAW AND SANCTIONS

It is almost universally admitted that international law lacks legal sanctions in the Austinian sense, but as has been discussed such a "deficiency" does not operate to rob international law of its legal nature. Furthermore, though legal sanctions may be absent, international law has other means of enforcement. Sanctions were defined as the means of inducing observance to law and these were seen to be of several sorts, moral, religious and social, which, grouped together, might be called "legal" in that they are means of supporting law. Municipal law depends greatly upon penalties specified in the rules themselves for sanctions, but international law cannot have penalties as that implies a determinate law-giver and a relationship of superior to inferior which does not exist in the equalitarian international realm.[1] International laws have sanctions, however, of a different sort, that is, there exist certain means of inducing states to conform to their legal obligations. When, as even some international lawyers declare, it is said that the law of nations possesses no sanctions,[2] what is there meant by sanction seems to be the legal variety of which admittedly there is very little, though if the law comes to be made more and more in great treaties, the sanctions of international law may in time become somewhat similar to those of municipal jurisprudence. It is in some treaties, as will be discussed at a later point, that specific penal provisions are found: here perhaps the collectivity of states in treaty making, acts as a "superior" prescribing "penalties" to any single individual state or citizen which may violate its terms. That may be the point toward which events are moving, but in the present fluid condition of international organization "penalties," except in certain treaties, are non-existent and international law has to depend upon other sanctions.

The means by which states are induced to observe international law rules may be classified as follows:

1. Fear of war or measures of force and reprisal.
2. Public opinion.
3. Fear of non-forceful measures of retaliation such as termination of diplomatic intercourse, embargoes.

[1] See Dickinson, *Equality of States in International Law.*
[2] Hyde, *op. cit.*, 9.

4. Judicial action.
5. Fear of ultimate consequences.
6. State penalties.
7. International standard of justice.

These are the sanctions of international law. They are among the factors which operate to prevent its violation. It will be observed again that sanction implies something subjective as well as objective; "fear of" as well as the actual thing feared. The sanctions of international law are what tend to make a state abide by the law; if it does not, certain consequences implicit in the sanction are the likely result and a state must make its choice. An alternative is involved in the conception of a sanction: on the one hand there are certain consequences of violation, on the other, the prospect of something gained by such a course. The fear of the consequences is the sanction which may or may not serve as a deterrent and outweigh the possible advantages of illegal action.[3]

A strong moral sense also would be a sanction, for the possession of it might induce a state or its leaders not to infringe upon a law thought to be just. Particular external consequences of a disagreeable nature might not be feared while violation in itself would be so distasteful to the state, its rulers and inhabitants, that they would not commit an infraction. The Utilitarians would term these, "external" and "internal" sanctions: in the first instance, fear of external consequences brings conformity; in the second dread of doing injury to one's conscience, one's sense of right—"internal" consequences—acts to prevent infringement. In either case, sanction is what induces conformity whether it be fear of external action or a sense of justice and the dislike of doing injury to such a sense. The two types are closely linked for both may be concerned at any particular moment when illegal action is under contemplation. Sanction is more than mere penalty, though the fear of a penalty is a feature of municipal law sanctions; it is a more inclusive term, and from Roman days to the present, except for certain Austinians, it has not been synonymous with penalty. "Internal" and "external" sanctions of course

[3] Hague Convention, 1907, No. III. Scott, J. B., Collection for the Carnegie Foundation—Art. 2. "The state of war should be notified to the neutral powers without delay and shall not take effect in regard to them until after the receipt of a notification. . . ." The sanction in that provision lies in the knowledge of the belligerent that unless it notifies according to the rule "neutrals" are not legally affected. The state has the alternative of conforming, or of being confronted with the situation that third states are not under neutral obligations in regard to it.

exist for municipal as well as for international law, but the lawyers of the former may restrict the term if they desire to state prescribed penalties. International lawyers cannot do that owing to the absence of any super-state.

In much of the post-war discussions of international affairs sanctions seem to connote definite penalties and measures of force. There is this drift toward Austinian concepts attributable to the drafting of the League of Nations Covenant in which specific measures called sanctions are enumerated. Sanctions in this usage become synonymous with coercive actions against violators, but these actions are not sanctions of international law—they are "penalties" for the infraction of a particular treaty. This restricted Austinian type of definition may be expected to gain wider vogue, however, if international organization develops and a situation more and more analogous to that prevailing in domestic affairs comes into being. It has become relatively common to link the application of sanctions, popularized by the much debated article 16 of the Covenant, with the violation of an agreement. Since 1914 feeling seems to have become increasingly widespread that treaties should not be infringed with impunity and that penalty of some sort should be the fate of the transgressor. The accelerated development of international machinery and of international cooperation—the League of Nations, the Permanent Court of International Justice, conciliation commissions, the Locarno agreements, pacts of mutual guarantee—is symptomatic of the growth of a world "community idea" and of a developing international solidarity, even though that solidarity is as yet extremely nebulous. The query arises constantly: what if some state attempts to stall this new machinery and refuses to cooperate and conciliate or perform as prescribed? The French are haunted by such a nightmare and are for various reasons in the forefront of the movement to create an international "policeman" whose functions are to begin the moment a breach is made in the Versailles-League-Locarno-alliance edifice of treaties. This policeman in much of current parlance and writing goes by the name of "sanctions"—his exact character, powers, and modi operandi are still vague (when and how he is to begin his duties is not clear—witness the problem of defining an aggressor) but he is thought to be already lurking, somewhat embryonically, in the international realm and to need only fostering by closer cooperation between states and more time in order to be more clearly defined and put to work on behalf of the international community, which like every community is deemed to need a guardian of the peace.

Hence sanctions and security have gone together in recent European diplomacy.[4] Sanctions thus often connote merely a police force[5] —so much has attention been drawn to the use of force against an aggressor—or the measures that such a police force might apply, but the term sanction itself should embrace something much wider than police force, state coercion and definite penalties.[6]

*1. Fear of War and Measures of Force*

Many hold that war or the fear of it is not a sanction. They regard it as so unmanageable, such a titanic, anarchic riot of opposing forces that they cannot believe that such a measure can be truly connected with law. It must be outside the Pale, they say, and sanctions must be found in something less crude, more moral, more connected with reason and justice.[7] Upholders of this point of view evidently look at legal sanctions inside the state, see that state penalties ordinarily fall with some precision upon the wrong-doer and then, looking at the international field, see the uncertainty of war, note how the "unjust" may win as well as the "just" and conclude that such a thing cannot be a sanction.

[4] See Madariaga, *Disarmament*, 1924, 135–136; 142–157. Rappard, *Uniting Europe*, 1928, League of Nations Pamphlet, *Disarmament and the Organization of Peace*. 1930; Mitrany, *op. cit.*

[5] Anthonis, H., *The Sanction of International Law*. (Pamphlet).

[6] So far in this discussion a point of view has not been mentioned according to which no measure can be considered to be a true sanction of the law unless it is an act which would be legal only when applied after a violation of the law; at all other times it would be illegal. (Feilchenfeld, E. H., *International Debts and State Succession*.) Under this conception, reprisals are the only sanction. Reprisals become legal only when employed against a law-breaking state and involve actions which are illegal unless such a breach has occured. Hostile public opinion, rupture of diplomatic relations, and embargoes would not be sanctions because they are legal whether an illegal act was previously taken place or not. In domestic law incarceration in jail or imposition of a fine is not usually legal unless the individual undergoing the penalty has previously broken the law. Public opinion would not be a sanction by such a definition. But first of all, reprisal in itself is not a sanction: it is the knowledge that it may take place that is the sanction according to the definition of sanction as that which tends to bring conformity to law. But even if the reprisal itself were the sanction, to limit sanctions to measures legal only when applied after an illegality has occured narrows the field unduly. Sanctions of international law are taken to mean all the means of inducing observance of the law; merely because some of them operate now and then in a manner unconnected with the law does not mean that they are any the less sanctions when they do join with the law. The more limited definition may be of greater use in municipal jurisprudence where legislation affords the opportunity to define penalties explicitly in the laws themselves.

[7] See Bluntschli, *op. cit.*, p. 7; Dupuis, *op. cit.;* Wright, "Changes in the Conception of War," *Am. J. Int. Law*, XVIII, 755–767.

But this, however, is looking at the war itself as a sanction, as a possible "penalty" and because the "penalty" may not hit the real "criminal," it is assumed that it cannot be legal. But war is not a sanction: war once begun does not induce observance. It is the fear of the war that is the sanction.[8] For some states admittedly it may not be a powerful one; fear of a conflict with Nicaragua probably would not be a sanction of vast importance so far as American observance of international law in relations with that country was concerned, but in the general course of events what tends to keep states from transgressing too flagrantly is the fear of provoking general hostilities. This applies particularly to the laws of peace; as for the laws of war this sanction is absent. The conflict once begun, there is nothing more to fear except military reprisals and measures of retaliation, though for laws of neutrality a sanction exists in the fear of the belligerent that powerful neutral states will be driven by illegal conduct on its part to join the forces of the opposition.[9]

When sanction is spoken of as the means of inducing observance or the means of ensuring enforcement of the law, the actual steps taken in the event of violation are not the sanction: they are only part of the story for it is the dread of those steps that keeps a would-be transgressor from wandering off the legal path. Much of the confusion about "war as a sanction" appears to be due to a failure to distinguish between war itself as a possible consequence of violation and the fear of the war as a reason for conformity. Law is kept in force often simply because of these fears and the dread of war certainly seems to be a formidable factor in inducing a state to keep within the law.

The problem of war as a method of settling disputes, of securing reparation for a violated right and the question of the fear of war as a sanction must be kept separate and distinct.

Because no "sovereign" has existed in the world community since the rise of nation states, there has been no central agency to determine when a violation of the law has occurred and to impose appropriate penalties. Each state has been left free to settle for itself

[8] Hyde, *op. cit.*, 10; Maine, *op. cit.*, 53.

[9] Maine, *op. cit.*, 222–223. The possibility that neutrals may arm to defend their rights would constitute a sanction for the laws of neutrality. See Scott, *Armed Neutralities of 1780 and 1800*, 1918. The possible entrance of the United States into the Great War upon the side of the Allied Powers was not an effective sanction for German observance of the laws of war at sea. See President Wilson's address to Congress, 26 February, 1917, asking for authorization to arm American merchantmen. Also, his address of 2 April, 1917, American White Book, European War IV, 422.

what it will do in the given circumstances and to prosecute its own rights. This procedure has gone by the name of "self help" and may be likened to Locke's state of nature where each individual enforces his own rights under natural (in the case of states: international) law. What it will do, how far it will go, whether it will merely protest diplomatically, or do more and actually go to war, each state decides for itself. Such is the theory that a state, in the absence of an international body, may attempt to penalize on its own account another state from which it conceives it has received an injury in the form of a violation of the law.

The earlier writers, imbued with the idea of a natural law regulating inter-state conduct, wrote profusely of this right of an injured state to engage in a "just war" for the vindication of its rights. "The use of force against those who will not submit to fair demands or will not be restrained by reason is not an injustice. For . . . the wickedness of the enemy convinces the wise man that the prosecution of 'just wars' is not only right but a necessity," wrote Ayala.[10] Zouche regarded war as a legal procedure between those who have no judge,[11] and Victoria states, "it is . . . certain that princes can punish enemies who have done a wrong to their state and that after a war has been duly and justly undertaken the enemy are just as much within the jurisdiction of the prince who undertakes it as if he were their proper judge."[12] Grotius had somewhat similar views, remarking that "the execution of the law is very difficult since it can only be carried into effect by arms,"[13] and Vattel, asserting that each nation may engage in a "just war" to repel an injury and "punish the violator"[14] cites the breaking of a treaty engagement as an example of such injury.[15]

These views that wars may be just prosecution of rights[16] were greatly in vogue as long as the natural law school held sway, but with the falling into more or less disrepute of natural law theories and with the increasing difficulty of differentiating "unjust" from "just" wars, the opinions of the early publicists were cast aside and a reaction set in. It was very well in theory to say that a state might declare war as a punishment for an infraction or to secure reparation, but in practice

[10] *De Jure Officiis Bellicis*, preface.
[11] *Juris et Judicii Fecialis*, para. v.
[12] *De Indis et de Jure Belli Relectiones*, para. 19, proposition 5.
[13] *De Jure Belli ac Pacis*, Bk. II, Chap. XLIV, para. 6.
[14] *Law of Nations*, Bk. III, Chap. III, para. 26.
[15] *Ibid.*, Bk. III, Chap. II, para. 15.
[16] See also absolute rights school, e.g. Rivier *Principes*, I, 257.

such a "just war" possibility would mean little to a state like Paraguay which might consider its rights infringed by a great power such as Great Britain. The uncertainty of war—the "just" state may lose (defeated states inevitably tend to hold that "wrong" has triumphed) —the fact that it works both ways and may win for the unjust even if it is clear who the unjust party is, have produced much skepticism in regard to war as a legal measure.[17] Where each state is the judge of its own cause the situation is rife with uncertainties. As Dupuis says, "War an act of force, can only establish force. It may be in the service of the law, it may be ranged against the law."[18]

The problem of the "just" and "unjust" war is still with us garbed in an altered terminology in all the post-war, post-Pact of Paris discussion of aggressive and defensive wars. Defensive wars are "justifiable" because they are in "defense" of the rights of a state as guaranteed by the law. But what is defensive? Who is the aggressor?[19]

In addition to the difficulties of judging "just" and "unjust," other objections have been raised. Since international law is "law between states, not above states,"[20] some have said there can be no question of punishment which implies a superior—states at present are sovereign and cannot be dealt with in a punitive fashion, as Victoria suggested, even if in the wrong. This brings in the whole tangled question as to what the war or the use of force is for:[21] is it merely to maintain the status quo and preserve the right, is it to secure reparation,[22] or is it in some way to punish the law-breaking state? These various motives are woven together and have been proclaimed as the justification, in one way or another, of all the wars in the past. This doubt as to the purpose of a war has operated to undermine still further the confidence in war as a legal measure.[23]

These uncertainties of war as a "penalty" or "punishment" and of the purposes of the war do not alter the fact that the fear of the war

[17] Bluntschli, *Le Droit International Codifié*, p. 515; Kant, *Eternal Peace*, 2nd definitive article.

[18] *Acad. de Droit Int., Rec. des Cours*, 1924, I, 407–436.

[19] See Shotwell, "War as an Instrument of National Policy and Its Renunciation in the Pact of Paris," Miller, "The Peace Pact of Paris," *American Foreign Relations*, 1929, 387–413. Eagleton, *op. cit.*

[20] Oppenheim, *Int. Law*, 2nd ed., I, 209; Kant, *Eternal Peace.*

[21] See Scott, *Am. J. Int. Law*, I. 831–866.

[22] For discussion of the objects of penalties see Saleilles *The Individualisation of Punishment* (Trans. by R. S. Jastrow, 1913), Chaps. II and III.

[23] See Quincy Wright, "Changes in the Conception of War," *Am. J. Int. Law*, 18, 755–767.

is a restraining influence upon states contemplating infringement. What the purpose of the war which perhaps ensues may be, which side may triumph, are secondary considerations from the point of view of sanctions which concern those means by which illegal activity is prevented rather than what happens after the sanction has failed to be efficacious.[24]

War of course may be feared when no illegal action is involved: likewise it may not be dreaded when unlawful conduct *is* in question. In the first instance, the fear of war is not a sanction of the law, in the second, it is not an effective one. That the same means may be active for other than legal ends does not mean that where law is concerned it cannot be considered as a sanction of the law, a means of inducing observance. Because a state may go to war for purely selfish, political ends does not suggest that war at times may not be declared for the vindication of strictly legal rights that have suffered violation. War is uncertain, it may be invoked for a variety of purposes and either "right" or "wrong" if there is any, may win out, but the sanction consists not in the war itself or its effects or results but in the fear of such a war. Its efficacy of course depends upon the strength of the states involved and the political combinations existing at the time.

What has been said of war applies also to measures of force short of war such as military or naval reprisals[25]—pacific blockade, armed intervention, display of force. As these measures are not as drastic as war, they are less to be feared and consequently are sanctions of a less influential character. As with war these measures of force may be used when no legal right has been infringed upon—technically in such a case they would not be reprisals—but a state breaking the law would have to face the possibilities of such measures, and hence the fear of them operates as a sanction of the law, for weaker states especially. As sanctions for a great power their importance may be

[24] One writer, Gorge, in "Une Nouvelle Sanction de Droit International," (Pamphlet) has remarked that "war is no sanction for those not afraid of the consequences." On such a basis nothing would be a sanction unless it could deter all prospective violators from performing illegal acts. Because the fear of a fine does not stop a certain automobile speeder, does not mean that there is no sanction present. Sanctions tend to prevent; if they do not they are still sanctions. If a state does not dread the consequences which a war would entail, it only means that the sanction in that case is not of great force.

[25] Hyde, *op. cit.*, II, 174, defines reprisal as "the act of taking or withholding of any form of property of a foreign state or its nationals, for the purpose of obtaining, directly or indirectly, reparation on account of the consequences of internationally illegal conduct for which redress has been refused." See also Hindmarsh, *Force in Peace*, *op. cit.*

minimized; a strong state is likely to regard the employment of measures short of war as an act of war itself[26] and the sanction of measures of less drastic character merge, in reality, into the single sanction of the dread of war.

*2. Public Opinion*

Another means by which international law is kept in force is through the power of public opinion.[27] Strictly speaking it is not public opinion itself which is the sanction, but the fear of unfavorable or hostile opinion. Public opinion operates of course in the domestic sphere as one of the "sociological" sanctions of the law, but it has been raised to a high eminence of importance in international law chiefly because the legal penalties of municipal law are missing. Public opinion is stressed because, after war and "self-help" which seem to many too barbaric and haphazard to constitute sanctions, there has not been much left to stress as far as the general law of nations is concerned. Jaecquemyns,[28] Kebedgy,[29] Maine[30] and Root[31] have been particularly enthusiastic about public opinion as a restraining force, but there are many objections.

First of all, what is public opinion? Within the state no one can answer this conclusively.[32] How much more indefinite it is in the international arena. Who is the public? Is it the statesmen and leaders of other countries? Is it the majority of the population of a majority of countries or a majority in the most influential states or what? Furthermore when the masses can be inflamed by scareheads almost overnight, and when the chords of patriotism, nationalism and selfishness may be easily played upon by skillful manipulators, the reliability of the opinion of the world may be seriously doubted.[33] It can be worked both ways as was the Lusitania episode which brought one

[26] See Hershey, *Essentials of Public International Law and Organization*, revised ed. 538.

[27] Nys, *op. cit.*, 151; Heffter, *op. cit.*, Introduction, para. 2.

[28] *R.D.I.* 1869, 225.

[29] *Ibid.*, XXIX, 113–125. "Si un état ne veut pas tenir ses engagements il peut lui en couter cher. . . . Le moins qu'il puisse lui arriver c'est de se discrediter, de provoquer les autres à ne plus attacher foi à sa parole, et à ne plus vouloir traiter avec lui avec confiance."

[30] *Op. cit.*, 220–221. "Few states or sovereigns remain unmoved by the disapprobation which an open breach of international obligations provokes."

[31] *Am. J. Int. Law*, II, 451–458. "The Sanction of International Law."

[32] See Lowell, *Public Opinion and Popular Government*, Lippmann, *Public Opinion*, and *The Phantom Public*.

[33] Pradier-Fodéré, *op. cit.*, 451–458.

reaction in Germany, another in the United States. German leaders did not fear the opinion of their own citizenry and if by propaganda a government may win over multitudes of people, of how much effectiveness is a public opinion which is so volatile, so unstable, so easily influenced?

Modern methods of communication have made the mobilization of public opinion, whatever it is, far easier than before and it is undoubtedly true that what Jacquemyns refers to as the "conscience of mankind"[34] may be readily touched by radio, cable and newspaper. But how it is to be touched is the question. Flagrantly illegal conduct on the part of one state surely would tend to evoke widespread disapproval among other nations, and to this extent fear of public opinion may act as a sanction. But since press and pulpit and platform may be controlled and since distortions may occur upon a grand scale, "pure" public opinion, the "real" conscience of mankind may never exist or be known. Also, unfavorable opinion may not act as a sanction in itself. It is the consequences and effects of the opinion, the manifestation of dislike in the form of overt and explicit acts, that the statesman really fears. What the people of a foreign country may think of him may make small difference to a strong leader such as Bismarck. Only if such thought leads to a diminution in the volume of trade or to the menacing of citizens of his state will he feel greatly concerned. For some men of a more sensitive and idealistic temperament, unfriendly opinion in itself may be a real source of discomfort, and it thus seems to depend upon the type of persons who are in guiding authority how much of a sanction public opinion can be. This makes the guaging of its efficacy extremely difficult. In the Sino-Japanese dispute, hostile world opinion seems only to have intensified nationalistic feeling in Japan and to have produced the opposite of a deterrent effect. This "direct action" here mentioned refers only to those activities which a people in the mass may spontaneously engage in as a result of their unfriendly feelings. It does not refer to measures taken officially by the government.

Particularly with reference to the Pact of Paris has public opinion come to the fore as a possible sanction. Speaking in the French Chamber of Deputies when the treaty was up for ratification, M. Briand declared "a country may tear up an act after having signed it, but in what kind of an atmosphere is it going to be placed? The moral responsibility for such a catastrophe brings today a heavy charge be-

[34] *Op. cit.*, 225.

fore the peoples. I pity the nation whose leaders would put it in such a position."[35] It is the United States, however, which places the greatest reliance upon public opinion and thus puts itself in opposition to the usual French thesis which is that opinion is not enough, and that the armed forces of the world must be linked together in grand and logical array behind international agreements. The American point of view was clearly expressed by Secretary Stimson when he called upon Russia and China, then at grips in Manchuria, to remember their obligations under the Pact of Paris. After declaring that the efficacy of the Pact rests upon the sincerity of the governments party to it, he continued, "Its sole sanction lies in the power of public opinion of the countries constituting substantially the entire civilized world, whose governments have joined in the covenant."[36] The same position was taken by Senator Robinson at the London Naval Conference of 1930 when he said the United States "would repudiate emphatically any treaty expressly or impliedly obliging our government to employ the army and navy for the enforcement of obligations assumed by other nations. It is for this reason that they do not encourage their delegation . . . to join in guarantees of security respecting areas remote from territory or possessions of the United States. Americans realize that no power will deliberately violate its undertaking for the limitation or reduction of armaments. They believe no sanction is necessary to assure the good faith performance of any treaty for that purpose."[37]

Thus it happens that at this time the French policy of maintaining the international situation fixed by the peace treaties coincides with the view that the armies and navies of the world must be regulated and put to work for the international community instead of being subject to the irresponsible desires of the various independent nations. Such a view is anathema to the extreme "outlawry of war" school which holds that "the implementing of the Briand-Kellogg treaty is simply a return to the war system. . . War is war whether it is fought by two nations to settle a dispute between themselves or by all other signatories of the treaty as over against the one alleged offender against the treaty."[38] War is war, but unhappily it seems only a

[35] *Journal de Genève*, 17 January, 1929.

[36] Press Releases, Department of State, 7 December, 1929. See, however, Report of the Committee on Economic Sanctions, 14 March, 1932, and statement of Norman Davis on Consultation at the Disarmament Conference, May, 1933, *op. cit.*

[37] New York *Times*, 20 February, 1930.

[38] *Unity*, 13 January, 1930.

dream that there will be no more of it, that there will be no offenders against treaties in the future. Are those offenders to be met only with a hostile public opinion or some other non-force sanction?

This question of public opinion is naturally linked with the "standard of justice" to be referred to later. When a statesman halts or changes his conduct because of public opinion alone, does he halt it so much because of the opinion as because of what the opinion represents? If the opinion represents the "conscience of mankind," is his own conscience not a part of the larger one and does he not refrain from acting chiefly because of "internal" sanctions: because his sense of right will not let him commit a transgression?

In conclusion, it seems proper to include public opinion as a sanction of international law, admitting its many uncertainties and limitations.[39] As far as it exists in regard to any given question, it is of value and of force mainly because of what it represents, that is, a certain standard of right which a statesman himself would hesitate to violate even were there no such thing as public opinion, and because of what it may lead to, namely, unfortunate consequences of a commercial or other sort.

### 3. *Other Measures Not of Force: Diplomatic Rupture, Economic Reprisals, Loss of Advantages*

In addition to force and unfavorable public opinion, there are other possible sanctions. The threat of a rupture of diplomatic relations[40] would very likely constitute a deterrent for a government which was anxious for and in need of recognition,[41] but such a measure is so closely identified with the purely political as contrasted with the legal, and so prone to be used merely as a step toward more forceful methods of pressure that its value as a sanction of the law is strictly limited. Likewise, economic reprisals[42]—embargoes such as those on arms or capital issued by the United States in recent years, seizure of public

[39] See Kant's *Commentaries*, 4th ed. I, Lect. IX, 182, for a rather optimistic view in regard to the efficacy of public opinion as a sanction.

[40] See Dumas, *Les Sanctions de l'Arbitrage International*.

[41] For U. S. policy toward Latin America *re* recognition see Moore's *Digest*, Vol. I; Williams, *Economic Foreign Policy of the United States*, 138–145; also statement by Secretary Kellogg, "Mexico on Trial," New York *Times*, 12 June, 1924.

[42] E. G.U.S. arms embargo, 1912 (37 Stat. 630).

E. G.U.S. capital embargo for Ecuador, *For. Rel.*, 1917, p. 738. See also Williams, *supra*. Chap. V.

For sanctions (economic) see also *Acad. de Dr. Int. Recueil des Cours*, 1924, III, 153–157; Report of the Committee on Economic Sanctions, *op. cit.*, See later p. 152.

or private property, non-importation acts—are possible sanctions, though here again they are so often used for political purposes where no legal issue or law violation is involved that their importance as sanctions may be minimized. The less forceful, the less effective measures are more likely to be employed for strictly political purposes than are those more dangerous and severe like war and measures of force short of war because their consequences are less devastating; a state might issue an embargo to further a policy solely of political gain when it would hesitate to employ an agency like war for such a purpose without some legal grounds to justify its course.

The use of embargo and other economic sanctions is of course called for in Article 16 of the Covenant and has been widely discussed in connection with the Sino-Japanese crisis as a possible sanction for the Pact of Paris and other treaties providing for pacific settlement and guarantee of the status quo. These economic measures would be employed as definite treaty sanctions and are considered later in this volume; embargoes, boycotts and reprisals are mentioned here simply as sanctions of general international law.

*4. Judicial Action*

The development of international arbitration and the establishment of the Permanent Court of International Justice raise interesting points so far as the sanctions of international law are concerned. With no super-state, courts or police officers, a nation has had no "legal" sanction to restrain it, no fear of penalties in the municipal law sense, no dread of being dragged into court. As long as arbitration remained voluntary for each particular dispute and as long as loopholes like "vital interests and honor" remained in arbitration treaties,[43] no judicial sanction was in existence. A state did not need to fear court procedure, though after the Alabama claims example, realization that such action might be initiated as a substitute for war—one or the other had to be faced—seems to have grown.[44] This was comparable to the early stages in municipal law development when courts were first set up and when the individual had either the sanction of private vengeance or court action to confront him.[45] Arbitration procedure is not judicial and "arbitration sanction" prob-

[43] Anglo-French treaty, 14 October, 1903. 96 State Papers, 35. See Buell, *International Relations*, 1st ed., 577–578.

[44] See Maine, *op. cit.*, 217 for the opinion that Great Britain was "penally dealt with" in the Alabama case for her actions during the American Civil War.

[45] See Saleilles, *op. cit.*, Chap. II.

ably would be a more appropriate term to use for the period before 1922 when the Permanent Court of International Justice was set up at The Hague.

For states signatory to the so-called "Optional Clause,"[46] a judicial sanction may now be said to exist. The sanction is not the legal one of municipal jurisprudence because a determinate superior political body with a train of enforcing agents behind it, does not stand back of the court. "Legal" sanction implies the whole system of sovereign legislator, courts and state officers but judicial sanction does not. A state signer of the "Optional Clause," violating a rule of international law has court action to fear as a sanction. If it refuses to abide by the decision of the judicial body, no sovereign state is there to coerce it but the fear of war and measures of force employed by the other party or by a group of states is there as a secondary factor. All kinds of sanctions may be involved in any one episode, just as moral, social and legal go hand in hand within the state. The ultimate international law sanction is fear of war or force, but the knowledge of the existence of a World Court into which a state may be hailed at the instance of only one party, operates as a preliminary sanction and as a regulator of the use of force. The latter still is largely a hope; inside the state, force normally is used in behalf of the law and in connection with courts and judicial procedure. The Permanent Court and the "Optional Clause" appear to be steps toward the realization of the use of international force in behalf of the law, toward directing it along legal channels so that when used it will be in support of a judicially determined decision. The efficacy of war and measures of force as sanctions depend upon what Krabbe would term an extra-legal sanction:[47] namely the states of the world must feel it to their advantage and interests to threaten war or to employ forceful measures in order to give potency to the fear of war as a sanction. The extent of the willingness of the members of the community of states to enforce the law determines the force of the sanctions. Readiness ultimately to go to war to support a court decision gives vigor to judicial sanction.

[46] Statute of the Permanent Court of International Justice. Article 36. For League members a sanction for illegal action likely to lead to a dispute exists in the provisions of Art. 11 of the Covenant and Arts. 12–15 calling for the pacific settlement of disputes by arbitral, judicial or conciliatory means. An additional sanction for the observance of an arbitral award is found in Par. 4 of Art. 13 where it is provided that the Council may take steps to render effective an arbitral award. Thus in addition to the judicial sanction furnished by the "Optional Clause" a League "arbitral" or "conciliation" sanction exists.

[47] *Op. cit.*, 122.

*5. Fear of Ultimate Consequences*

The lack of precision and the grave uncertainties as to the effectiveness of the sanctions up to this point, have led some writers to extend the search and to reach out into long range history.[48] They feel that there is really no sure sanction for a "criminal state" when such a deterrent is most needed, that is, when the state is flushed with success and at the peak of its power. Despairing of curbing willful and arrogant nations when they consider themselves capable of acting independently and in defiance of the law, these writers warn of future retributions for present sins and hold that in the fear of the results of selfish actions is found the true sanction of the law. Such is frequently the cry when the unjust appear to be getting the best of things, when the machinery of justice functions very imperfectly and the might of the stronger generally prevails. The conception that in the ultimately deleterious consequences of wrong action is found the sanction for that action is not new or of particularly great importance, but it is interesting here in that it shows the lengths to which some writers feel that they must go in order to find a sanction for international law. It is indicative of the lack of confidence, on the part of certain publicists, in international law as a serious factor in the regulation of international conduct at any given period.

Among the exponents of this view have been Funck-Brentano and Sorel who have written, "The nations always live long enough to suffer the consequence of their acts. . . . It is in the necessary chain of cause and effect in which is found the sanction of the law of nations."[49] In other words, a nation may today acquire certain advantages in an illegal fashion, but in the longer course of the centuries those whom it exploits will rise up when they can and take vengeance. In this connection the story runs that Thiers once asked the German historian von Ranke, "À qui donc faites vous la guerre?" and the reply was, "Louis XIV."[50] In substance this view would agree that war and "self-help" are sanctions but that they function usually

[48] A poem by Kipling touches this view:

Far-call'd our navies melt away
On Dune and Headland sinks the fire—
Lo, all our pomp of yesterday
Is one with Ninevah and Tyre!
Judge of the nations, spare us yet,
Lest we forget, lest we forget.

[49] *Précis du Droit des Gens*, 8–9.

[50] Despagnet, *Cours de Droit Int. Pub.* par. 39.

only tardily (when a wronged state is able to indulge in "self-help") and are not useful as sanctions for the law of the present.

When applied to treaties this consequence doctrine takes on a new aspect. The same writers and others[51] have asserted that a good treaty will endure, while a state imposing an unfair treaty will suffer by seeing it torn up or ignored in the future. It is related that in the year 328 B.C. when the Romans and the Privernes were negotiating a treaty, a deputy from the latter people appeared in the Roman Senate and when asked to express an opinion, said, "If you give us a good treaty it will be faithfully kept in perpetuity, but if it is disadvantageous, it will not last long."[52] The statement rings as true today as it did 2300 years ago, but the consequences of a vicious and harmful treaty cannot be considered as sanctions of a treaty. The state imposing a pact beneficial only to itself has every inducement to observe it; it would not violate the agreement and yet, by the consequence-sanction doctrine, it is the one which suffers. The violating state may be justified on grounds of morality or ethics but it inflicts harm upon the treaty-keeping state, whereas a sanction should operate in the reverse fashion. This brings us back to treaty revision and termination already discussed.

The dread of future consequences of illegal conduct may be considered as sanctions, as they are of all human conduct, but they too are uncertain and not satisfying for anyone who seeks the maintenance of legal rules today. They furthermore are inaccurately regarded as treaty sanctions by many of the expounders of this view. They are sanctions of the possible illegal *content* of a treaty, not sanctions of the treaty itself as here understood, for by treaty sanction is meant the inducement to observe a treaty, not a penalty for an inequitable state of affairs established thereby.

*6. Fear of State Penalties*

Private persons may violate the law of nations[53] as well as states but the sanctions which operate in the case of individuals are not the same as where states are concerned. What the private citizen fears is

[51] Brown, P. M., *International Realities, 21;* Despagnet, *op. cit.*

[52] Barbeyrac, *Histoire des Anciens Traités*, II, 242.

[53] E.g. that pertaining to the inviolability of diplomatic agents. This international law principle is supported by municipal legislation in the U. S.: Rev. Stat. secs. 4063–4064, state "the person of any public minister of any foreign prince or state authorized and received as such by the President etc."; in England the first statute on this topic was of 7 Anne c. 12.

not war or world opinion but the penal action of his own country which has made international law part of its law and attached its own sanctions.[54] These sanctions are "legal" sanctions of international law in the strict sense—they are state prescribed penalties.[55] Thus each individual state member of the world community gives strength to the law by putting its mechanism of coercion behind the international rule. Lieber's Code[56] for the American Army in the Field contained principles now recognized as part of the law of nations and these rules of warfare thus have state sanction behind them. Laws have been made by various nations on many subjects such as protection of ambassadors, neutral obligations[57] and piracy.[58] These laws are municipal laws, not international, but they add a municipal sanction to the rules of international laws and strengthen them to that extent.

Where a state does not pass statutes prescribing penalties for the violation of international rules, the courts of that state may nevertheless provide a judicial sanction. They adjudicate questions of international law[59] involving not only private individuals, but also states themselves as parties where these latter give their consent.[60] Thus a state, either by its own enactments supplementary to international law or by its courts applying directly international legal rules, provides "legal" or judicial sanctions for international law of a very effective sort.

### *7. International Standard of Justice*

The difference between law and morality has perturbed many jurists as well as moralists. That there is a distinction seems to be universally recognized but exactly what that distinction is has been a subject of wide disagreement. Jellinek thought of law as minimum

[54] E.g. Neutrality laws of the U. S. Rev. Stat., secs. 5281–91.

[55] Kent, *op. cit.*, 182.

[56] Instructions for the Government of Armies of the United States in the Field. 24 April, 1863.

[57] See notes 1 and 2 *supra.*

[58] U. S. Comp. Stat., 1918. Par. 10463, 35, stat. 1145: "Who ever on the high seas commits the crime of piracy as defined by the law of nations and is afterward found and brought into the U. S. shall be imprisoned for life." See Dickinson, *op. cit.*

[59] See Duke of Newcastle's Answer to the Prussian Memorial concerning neutral ships, 8 February, 1753. (*Collectanea Juridica:* Francis Hargrave. London, 1791. Vol. I, 129); The Zmora L. R. (1916) A.C. 77 . . . "the law which the prize court is to administer is not the national, or as it is sometimes called, the municipal law, but the law of nations—in other words, international law."

[60] *Emp. of Austria* v. *Day and Kossuth,*" 2 Giffard, 628; *The Sapphire* 11 Wall., 164.

ethics,[61] but what have the rules of court procedure, for example, to do with morals?[62] Thus the content of many rules which are recognized as legal seem to have nothing ethical about them, while a law such as that against murder seems to concern morals a great deal. Furthermore, though the content of a rule may seem remote from ethics, the question of obeying it may involve moral factors. The question as to which side of the highway one should keep is legal, but to violate the rule involves not only infringement of a legal duty but perhaps a moral one as well; one goes against a regulation which is made in the interests of all and whose infraction may bring harm to others. Is not one by conscience as well as by fear of penalty or of evil external consequences bound to obey a rule which seems just, that is, in the interests of all,[63] whether that rule be legal or moral?

The connection between law and ethics was close through medieval centuries and into comparatively modern times: law was Right and was prescribed by God directly or indirectly through human agencies.[64] The development of statute law, of "Gesetz" and "loi"—of positive sovereign commands which one was bound to obey legally because of the source of the authority, however, destroyed much of the close relationship between ethical and legal duties; positive morality was different from positive law. Blackstone[65] was able to make the distinction between "mala in se" where we "are bound by conscience by superior laws before human laws were in being" and "mala prohibita" where there is no question of moral guilt and where conscience is not concerned. For these latter one simply suffers the prescribed penalty and conscience is clear.

Several have made the distinction between law and morality on the basis that laws are those rules enforced by external compulsion while moral rules are those enforced by internal compulsion, that is, conscience.[66] But is the dividing line as definite as that? Some rules like

[61] *Die Social-ethische Bedeutung von Recht, Unrecht und Straf*, 42.

[62] See Korkunov, *op. cit.*, 61–62.

[63] See Holcombe, *Foundations of the Modern Commonwealth*, 251.

[64] Cicero, *De Legibus*, 1, 6.; Aquinas, *Summa Theologica*, 1, 2, quest. 91, Art. 2; Grotius, *De Jure Belli ac Pacis*, 1, 1, 10. These refer to the law of nature. Aquinas *supra*, II, 1, quest. 90: De Lege, Art. IV, speaks of law as an ordinance of reason for the common good: the purpose of law is stressed rather than its source while the Austinians do the reverse, basing law on its source rather than content. See Laski, *Authority in the Modern State*, 54–60.

[65] *Op. cit.*, 57.

[66] Ihering, *op. cit.*, 248. "The difference between the imperatives of law and those of morality and ethics is that the former have the element of external coercion connected with them by the power of the state and administered by the same."

those against homicide are enforced by both conscience and external pressure and this external pressure may not be political in character. With rules against cheating and lying: they are enforced partly by conscience, partly by external pressure purely "social" in nature like public opinion, and to some extent by state or political authority. Are they laws or are they moral rules? May they not be both? Admittedly the Austinian, with his clear cut definition of law as the command of a sovereign, quite distinct from positive morality, has the most convenient and precise view. But this conception of positive law, especially as far as international law is concerned, we have seen to be altogether too narrow, and law is something wider and more extensive. It spreads out into the domain of morals as Jellinek suggested and even an Austinian command may refer to "mala in se" as well as "mala prohibita." A hard and fast boundary line between law and morals seems impossible to discover: legal rules do not cover all morals, nor do morals cover all law, but they overlap.[67] Where law is conceived as "Droit" or Right, there certainly most of all conscience is involved and ethics and law are closely joined.

Whether some laws are obeyed merely because there is a penalty attached by the state or because there is the opinion of one's neighbors to consider or whether they are obeyed for conscientious reasons because they seem just or simply because they are "the laws" is very much of an individual matter and is a question of fact. "Mala in se" and "mala prohibita" are both involved in the law, and occasion

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Holland, *op. cit.*, 34. "Morals: a science of rules enforced by a determinate authority. Law: a general rule of external human action enforced by a sovereign political authority."

Oppenheim, *op. cit.*, I, "The characteristic of the rule of law is that it shall be enforced by external power. Rules of law of course apply to conscience quite as much as rules of morality but (moral rules) require to be enforced by the internal power of conscience only."

[67] Wundt, Wilhelm, *The Principles of Morality and the Departments of the Moral Life*, (trans. by M. F. Washburn, 1901) 176–177: "Whenever legal formulas have to be interpreted, we find the principle universally recognized that the will embodied in the law must never be conceived as in opposition to the general norms of morality. We must . . . distinguish between law and the legal order. The latter may contain many special ordinances that have no immediate references to any moral end. The ordering of social life makes it necessary to have regulations with reference to certain needs that possess in themselves no moral significance. . . . But no matter how many morally indifferent elements may be included in a given system of law . . . law as a whole, can have no other than a moral content."

Bierling, *Zur Kritik der juristischen Grundbegriffe*, i, 153 says that in regard to content all legal norms are moral norms and that the distinctive feature of law is not in its content but in certain formal properties it possesses.

different reactions among different people. Morality and jurisprudence are closely intertwined and no complete disentanglement would be satisfactory even were it possible to disengage them.

Though as Hall[68] says there is a difference between international law and international morality, many of the rules governing international conduct do seem to contain a large element of morality, particularly those regarding the methods of warfare. Is the duty not to fire on undefended towns,[69] to treat prisoners humanely,[70] and not to pillage,[71] purely legal? It would appear not, and what would tend to hold a military official in accord with the law in such cases would be his sense of a standard of justice; a moral sanction or dread of his own conscience. In the heat and stress of action such a sanction may not be of very great effectiveness but it none the less exists. Between the civilized nations who are subjects of international law certain standards of conduct, reflected for example by the rules of war, do exist, and though they may break down and have broken down in the past, they do exercise a restraining influence upon would-be violators. Public opinion, in so far as it is supposed to represent the conscience of mankind comes into play as an additional factor once the standard of justice appears to have been violated. Both the conscience of the individual state official who is directing affairs and that of mankind as a whole, manifest in an aroused public opinion, are sanctions to be considered. In so far as there is an international standard of justice, a line beyond which civilized people would not trespass except in the direst of straits, it operates as a brake upon the violation of many of the rules of international law; it induces conformity to the law and thus is a sanction. No doubt Austin would scoff at such a sanction as in any way "legal," but his propositions as a whole are unsuited to international law and there seems no good reason for excluding a sanction which tends to enforce the legal rule.

The sanctions of international law which have been considered up to this point serve also as treaty sanctions, that is, as means of inducing observance of treaty obligations, for, that treaties are to be observed, has been a rule of international law of long standing. The early publicists like Grotius, Pufendorf and Vattel based the binding char-

[68] *Op. cit.*, 14.

[69] Hague Convention, IV, "Respecting the Laws and Customs of War on Land," Article 25.

[70] *Ibid.*, Article 4.

[71] *Ibid.*, Articles 28 and 47.

acter of treaties upon natural law and sacred duty imposed by God, Vattel for example stating, "Who violates his treaties violates at the same time the law of nations; for he despises the faith of treaties, that faith which the law of nations declares sacred."[72] Religious and moral principles, especially in ancient and medieval days, as will be seen later, have given support to the concept of inviolability, but in more modern times other theories have been elaborated. Some have based the binding nature of treaties upon the self-restraint of a party in becoming a party to a compact[73] while Triepel[74] speaks of the will of the contrasting persons as giving the binding force. Krabbe places the obligation "in the sense of right of all civilized nations."[75] Whatever may be the validity of these theories the fact remains that it is a customary rule of international law that treaties are binding[76] and that it is a duty to observe them.

"The violation of a treaty is a violation of the law of nations."[77] Measures which tend to prevent violation of the law thus perform in the same manner on behalf of treaties, so that fear of war, public opinion, etc. are sanctions for treaties as much as for any of the rules of the law of nations.

But are all treaties binding by international law and would the sanctions contained in all treaties be included among the sanctions of the law in general? The answer must be in the negative. A treaty might contain provisions counter to the law such as the classic example of a possible convention providing for the appropriation of certain parts of the sea beyond the customary limit of territorial jurisdiction. Some of the 18th century treaties such as that between the United States and France of 1778 were rendered obsolete in part after a few years by the development of the law of neutrality.[78] Certainly it cannot be said that all treaties at all times are binding by international law. The whole question of "rebus sic stantibus" brings in a vast amount of uncertainty, so that only for treaties which conform to the law—subject also to the qualifications of changing times and

[72] *Law of Nations*, Bk. III, XV, 221.

[73] Jellinek, *Staatenvertrage*, 3; Hall, *op. cit.*, par. 107.

[74] *Völkerrecht u. Landesrecht*, 82.

[75] *Op. cit.*, 255.

[76] Oppenheim, *op. cit.*, I, 655; Bluntschli, *Droit Int. Cod.*, 1874, 440. Rivier, *Principes*, II, 38.

[77] Kent's *Commentaries*, 4th ed., 182.

[78] Hyneman, C., "Neutrality during the European Wars," 1792–1865, *Am. J. Int. Law*. XXIV, 286. See *supra*, p. 9. Hall, *op. cit.*, p. 404.

conditions—may one say that international law prescribes the duty of observation. It should thus be kept clear that treaty sanctions are of two sorts. There are the sanctions contained in the treaty provisions themselves; there are also the sanctions of the law in general which may be invoked when the rule is broken which has just been described, namely, the rule that treaties in harmony with the law are binding by law upon the parties to them. The sanctions provided for in a treaty contrary to the law would be sanctions merely of that treaty and not of the law. Sanctions of treaties not counter to law may be considered as being among the sanctions of the law, the general sanctions of which in turn, in such a case, would be included as treaty sanctions.

For treaties, however, the general sanctions of the law have been supported by treaty sanctions in the strict sense, namely, the special means employed to secure performance.[79] These means of inducing observance or performance have been of various sorts, sometimes specified in treaty texts themselves, sometimes implied by special ceremonies and acts at the time of signing and ratification.

Because treaties are written documents it is possible to insert definite "penalties" into their texts. The fear of these "penalties" seems analogous to the sanctions of municipal statute law, so that if treaties develop as international legislation, covering more and more of the field of international law,[80] the sanctions of the latter should become more and more like those of municipal jurisprudence. If such transpires, perhaps, the Austinians would be more willing to indulge international law within their definition of a legal rule. In any event, if more and more law continues to be incorporated and drawn up in treaty form, treaty sanctions will come to play an ever greater and greater rôle among the sanctions of the law and perhaps will become as important as the "penalties" of municipal statute law. International law sanctions may come to mean chiefly "penalties" somewhat in the Austinian sense.

The distinction has been made here between international law sanctions and treaty sanctions. The latter may be sanctions of the treaty only and not of the law when the treaty contains provisions contrary to the law. Such is the often made German contention with regard to the treaty of Versailles where mere "Zwangsmassnahmen," force sanctions in the treaty, are distinguished from "Gewaltmassnah-

[79] Hershey, *op. cit.*, 452.

[80] See Hudson, "Aviation and International Law," *Am. J. Int. Law*, XXIV, 228–240.

men" which are termed true sanctions of the law.[81] The treaty being unjust, neither the sanctions contained in the document itself nor any outside force which the victorious powers may care to exercise in the event of violation would be legal sanctions—such is the German viewpoint. Once again the difficulty presents itself: how is one to determine whether a treaty is "just" or not.[82] If "just," then certainly most would agree that strong sanctions would be desirable; if "unjust," then by no means should it be given added support. The problem of course is most acute where peace treaties are concerned, for there, the defeated party will naturally be prone to protest sooner or later that the treaty is illegal. The prevention of war is thus linked with the problem of sanctions. If "private" war is progressively eliminated, the fewer "unjust" situations established by treaty will there arise and the less cause for distrust of sanctions as enforcers of "wrongful" conditions. There will be more chance for legal sanctions the fewer the treaties likely to contain illegal provisions and the greater the opportunity for treaty revision and reconsideration. Attention is again called to the intimate relationship between treaty sanctions and treaty revision.

[81] Bergmann, Gerhard, "Der Begriff der Sanktion im Versailler Friedensvertrag." Pamphlet, 1927.

[82] *Supra*, p. 80.

# CHAPTER IV

# TREATY SANCTIONS

Treaties rely not only upon general international law for their enforcement but from earliest times have frequently contained in themselves their own sanctions. These are strictly and truly treaty sanctions. They are specified by a treaty itself for the violation either of certain particular provisions or of any portion whatever of the agreement. In the earlier treaties, where the sanctions are mainly of a moral nature, the sanctions are designed to operate on behalf of the treaty as a whole. In more modern times when treaties have taken on something of a legislative character and often regulate such matters as commerce and communications and international business relations there is to be observed a tendency to insert penalties for the infraction of specific provisions. Also some treaty sanctions affect the state as a whole or the officially recognized leaders of that state while others act directly against any individual who infringes on the terms. The discussion of treaty sanctions will be divided along these lines under two general headings, (A) the one pertaining to those concerning states and official persons, (B) the other relating to sanctions operating upon individuals. Under both these divisions, sanctions of the whole treaty and sanctions of particular sections will come under examination.

## PART A

### WHEN THE STATE AS A WHOLE OR THE RULER ACTING AS THE STATE IS CONFRONTED BY A SANCTION

Twelve different varieties of this type of sanction may be distinguished, but only five are really of any current, practical concern. Those which are virtually obsolete and of historical consequence only will be treated first.

#### I. OBSOLETE OR OF SMALL IMPORTANCE

*1. Religious and Moral*

As with the case with public opinion, religious and moral sanctions are largely subjective. They are really effective only where there exists strong belief in avenging deities and a fear of divine wrath. Just as the term sanction in early Roman days had a decidedly re-

ligious connotation and only became secularized by the usage of later days, so treaties were regarded as sacred documents from antiquity up to comparatively modern times;[1] to break them meant the commission of a religious offense and they were usually signed with an oath and placed under the guardianship of the deities in vogue at the epoch of signature and ratification. The sanction lay in the dread of the sufferings of conscience and in whatever the supposed Gods might mete out as punishment—perhaps a thunderbolt from Zeus or damnation in an eternal hereafter. These of course would very probably be supplemented by the general human sanctions such as fear of force which an injured state might employ as a result of the violation of the pledge to observe the treaty.

The fear of retribution imposed from on high could act as a very efficient deterrent for a community imbued with a real sense of the immanence of theocratic intervention in the affairs of men. But immediately faith in personal deities begins to weaken and conscience as a guide to human conduct becomes less of a factor, the sanction, being mainly subjective and depending upon religious tenets for its existence, disappears. Even when the more primitive beliefs were more strongly held, these religious and moral sanctions were of doubtful effects as the records of one broken treaty after another of Greek, Roman and medieval days testify. A violator people or ruler seemed to suffer no particular pangs of conscience or to be visited with no noticeably heavenly punishment, and though the earlier forms of oath and invocation persisted into the 19th century, they were then mainly anachronistic survivals of past usage. What Walter Lippmann terms "the acids of modernity"[2] have destroyed almost entirely the remnants of faith in God as a punitive factor and treaties today are secular documents with no pretensions to divine protection. The record of the lack of potency of religious sanctions as deterrents to violation combined with the change in religious outlook has made religious sanctions of treaties mainly a matter of history.

These religious sanctions, now obsolete for the most part, fall into three groups, the first of which is that of oaths:

(*a*) Oaths

As before suggested treaties originally in Egyptian and Grecian times were considered sacred and solemn undertakings, entered into

[1] See Egger, *Études Historiques sur les Traités Publics chez les Romains.*
[2] *A Preface to Morals*, 1929.

with elaborate systems of oaths, the sanctions here being for violating the oath accompanying or inserted in the treaty. One of the earliest of these oaths is that found in the agreement of Amphicyton, third king of Athens, setting up his famous council in 1496 B.C., which reads: "If any city or nation break the engagement of this oath, may said city or nation be considered as meriting all the vengeance of Apollo, Diana, Lato and Minerva and may all its lands be sterile and unproductive."[3]

The ceremonies surrounding the signature of a treaty or prescribed for its ratification were frequently elaborate in the extreme. In the agreement between Sparta and Athens in 421 B.C. one finds:

"The Athenians will swear to the Lacedemonians and their allies and to each city separately. All Athenians will take the ordinary oath while the most important citizens will swear as follows: I shall observe this treaty exactly and without treachery. The Lacedemonians and their allies will swear the same. Both sides will renew the pledge every year and it shall be engraved upon the columns at Olympia, Delphi, Corinth, Athens and Sparta."[4] Thus the oaths were frequently taken by an entire population. They were sometimes assumed also by special magistrates for just that one function.[5] Copies of the agreement were placed in the temples of the contracting cities and often too in neutral cities and in the principal religious sanctuaries of Greece, and as if that were not enough, it was frequently agreed that the oaths should be renewed (as in the treaty above between Athens and Sparta) at certain fixed and solemn epochs like the Olympic games and the Pan-Athenaic celebrations.[6] Thus whole peoples were included in the oathtaking process and were kept reminded constantly of the sanctity of their obligations.

At the signing of a treaty of alliance between Athens and some of her neighbors in 420 B.C. the most sacred sacrifice, the entrails of a bull, was offered, and the treaty declared that the oath of observance should be written upon a special stone column.[7] When the King of the Medes and the King of Lydia gave their signature to a treaty (597 B.C.) each ruler made an incision in his arm and allowed his blood to mingle with that of the other while repeating the oath,[8] and Xenophon

[3] Barbeyrac, I, 2.
[4] *Ibid.*, 145.
[5] Egger, *op. cit.*, 44–45
[6] *Ibid.*
[7] Barbeyrac, 152.
[8] *Ibid.*, 46.

relates[9] how at the ceremony of signature to a treaty between certain Greeks and a general of Cyrus' troops, the Persians ripped open a boar, a bull, a wolf and a ram while the Greeks dipped their swords in the blood of the victims. Not long after this ripping and dipping, however, the Persian general showed how much it meant to him by abandoning the Greeks and betraying them.

The use of treaties of oaths and their close association with religious ceremonial continued in Roman times, though as will be seen later, the Romans used hostages more, and relied less upon religious sanctions than did the Greeks. The making of all Roman treaties included an exchange of solemn vows between the Fetials and the representatives of the other side but few special ones like those of Greek days are found in the treaties themselves until the period of the later empire, when, for example in the treaty between Alaric and Rome, made in 408 A.D., each party swore "to keep and observe religiously this treaty"[10] in addition to taking the customary oaths regularly made according to "Jus Fetiale"[11] by the heralds who carried on the Roman diplomatic negotiations and whose participation was necessary to make the agreement legally binding. After being sworn to by these officers, the treaties were put on copper plates and placed in the temple of Jupiter Capitoline whose treasures the aediles looked after.[12]

During the early Middle Ages with so much of the political and social structure of the times resting upon compact and oaths of allegiance and protection between lord and vassal, and with religious feeling running high, it was only natural that the formal agreements between the heads of peoples and between the outstanding nobles and kings should have been accomplished with much stress upon formal vows and declarations. To differentiate a treaty as we generally define it today, that is as an agreement between states,[13] from mere feudal contracts between a chieftain and his superior or inferiors is almost impossible in an era when states as such did not exist and when Europe was a welter of semi-barbarous, petty principalities with boundaries vague and allegiance upon a personal rather than a territorial basis. However, the agreements between the recognized

[9] *Ibid.*

[10] Barbeyrac, II, 82.

[11] For account see Cicero *De Officiis* I, II; D. J. Hill, *History of European Diplomacy*, 8–11; André Weiss, *Le Droit Fêtial et les Fêtiaux sous la République Romaine*, 1880.

[12] Barbeyrac, I, 277.

[13] See Wilson and Tucker, *op. cit.*, 203.

heads of important areas or between political entities independent and separately distinct enough to be classed in rough fashion as "sovereign" or nearly sovereign do correspond sufficiently to international agreements to warrant the appellation of treaty and as such will be considered here.

In separate paragraphs of the agreement between Charles the Simple of France and Henry of Germany signed at Bonn, 926, each king "promised on my sacred oath to maintain this friendship firm and inviolate"[14] and in 1177 the princes of the Empire and several bishops of the church stated in an agreement, "We swear with our hands upon the sacred book of God to observe . . . in good faith this peace between Church and Empire. . . ."[15] By the 13th century a more or less set formula was placed in most of the treaties of the period, the following being typical, "Et a plus grant fermete des devantdites choses nos promettons par nos sairements dones corporelmant sus saintes Evangiles a tenir et a garder les devantdites choses."[16] Custom soon added another feature in the form of the seals of the contracting parties which were intended as extra manifestations of the sense of obligation. The treaty of union in 1351 between the Swiss cantons of Zurich, Lucerne, Uri, Schweitz and Unterwalden contained the formula as elaborated over the 13th century example cited above: "Nous avons publiquement jure et faict serment a Dieux et aux Saincts la garder et entretenir perpetuellement et fidellement a jamais irrevocablement . . . afin que toutes choses y dessus escriptes . . . demeurent fermes et stables a perpetuite. . . . Nous les dessus dictes villes . . . avons publiquement fait pendre nos sceaux a ces Lettres."[17]

Like phraseology went into the document of confederation between 55 cities of Suabia, 22 February 1385,[18] and one of the earliest English versions of this character is in the treaty between Edward IV of England and James III of Scotland (28 September 1473) which reads in part: "And to the observyn, keping and fulfilling of all and synder thir articlis and conditionns above writin, lelily and truely without fraude or gile, athir of the sade Lordis . . . hath feithfully promised as fere as in yere pouer is, and for the more securite to the

[14] Dumont, *Corps Universal Diplomatique de Droit des Gens*, I, 29.
[15] *Ibid.*, 101.
[16] *Ibid.*, 232 (Philip Count of Savoy and Burgundy and Hugh, Duke of Burgundy, 7 April, 1270).
[17] *Ibid.*, 258.
[18] Dumont, II, 192.

part of this Indenture hath interchangeable sett to yair selis and subscrivit thaim with thar own Hands."[19]

The inclusion of formal oaths and the placing of seals continue in approximately the same form during the succeeding centuries. In some instances a vast amount of pomp and ritual was resorted to as indicated in the wording of the alliance between Francis I and Henry of Navarre (26 Sept. 1523)[20] in which Henry states that he went into the cathedral of Cordeliers and on his knees before the altar, swore on the "Te Igitur" and "the holy true cross" that he would fulfill the obligations contracted in the agreement. Where the parties were not of equal rank or where one was in a more advantageous position than the other, the oaths were not always taken in equal style. There is nothing to indicate in the situation above that Francis went before an altar on his knees; presumably that was for the less noble or powerful Henry to perform.

Probably because a ruler's word came to be considered insufficient in itself, rather than because of any clamor on the part of the people or lesser nobles to be consulted in a ratification process, the oath taking procedure frequently included many others besides the immediate royal parties. In the treaty of peace between Henry II of France and Philip II of Spain (3 April, 1559) the former promised "pour plus grande seurete de ce traite de paix et de tous les points y contenu—le fera—jurer—par le—Daufin, son fils, et le fere verifier—en la Cour de Parlement a Paris et en tous autres Parlements—de France avec l'intervention et en presence des Procureurs Generaux esdites cours de Parlement."[21] All this public examination and verification of Henry's oath doubtless was designed to give Philip more assurance concerning Henry's probably none too strong sense of obligation.

The seventeenth century brought little change either in the wording of oaths or in the manner of their taking. Louis XIII in a treaty with England (24 April, 1629) solemnly announced, "Nous Louis—jurons —sur les Saintes Evangiles—que nous accomplissons et observerons, ferons observer, accomplir pleinement, reelement et de bonne foi tous et chacuns les Points et articles"[22] and in 1644 Louis XIV and his wife Anne went through an involved pledging process by swearing,

[19] *Ibid.*, III, 461.
[20] *Ibid.*, IV, 392.
[21] Dumont, V, 34.
[22] *Ibid.*, 581.

in the presence of the English ambassador and many of the dignitaries of the realm, with their hands on the Holy Gospel, to observe the treaties of their predecessors made with Britain.[23] Article 9 of the treaty of Aix-la-Chapelle (2 May, 1668) between France and Spain states that "both the kings shall solemnly swear on the cross, the gospels, the canons of the mass and on their honor to observe all the articles—really and sincerely."[24] Between nations of different religious faiths the device was employed as in the English-Turkish agreement of September, 1675 in which Mahomet IV said "we swear and promise by Him who created Heaven and earth and all creatures, we promise by the one only God the creator, that nothing shall be acted contrary to this present imperial capitulation."[25] Greek tactics of inscription of texts and oaths upon pillars were resorted to by the Russians and Chinese in the first treaty between an occidental and far eastern state, in 1689, when the sworn obligations of each party were to be engraved upon boundary stones in four languages (Tartar, Chinese, Moscovite and Latin).[26]

By the 18th century, however, the use of the very formal and elaborate oath declined rapidly, though one last prominent instance of its employment was in connection with the Franco-Swiss treaty of 1777 which was solemnly confirmed by the contracting parties in the cathedral of Soleure.[27] The connection between religion and politics became less intimate after 1648; treaties took on more of a purely secular, business tinge and what seems most important, the religious oath had shown itself to be almost valueless. Despite supposedly very sacred vows before altars and on holy relics, monarchs did not seem to dread any evil consequences from heaven if they found it expedient to break an agreement—which they did with amazing frequency. The years between 1648 and 1713 are particularly rich in the number of broken treaties whose preambles declared "a perpetual peace is hereby established" and with many of which solemn vows were taken. The "Peace of the Pyrenees,"[28] of Nimeguen[29] and of Reswick[30] represent but some of the outstanding occasions upon which the European na-

[23] *Ibid.*, VIII, 301.
[24] Horsley, *Political History of Europe*, 166.
[25] Horsley, 197.
[26] De Martens, *Nouveau Recueil*, XVII, 173.
[27] Phillipson, *Termination of War and Treaties of Peace*, 277.
[28] Horsley, 101.
[29] *Ibid.*, 188.
[30] *Ibid.*, 253.

tions attempted to mend the shattered framework only to have it rent in pieces within a short period. Most of the agreements were ones of peace or alliance or general friendship which were scrapped as soon as a ruler considered it to his advantage. Considerations of the general interest, of commerce, of mutual benefit were not so much in evidence to hold him back as in the later 19th and 20th century treaties, and he apparently was not troubled about violating his oath: God's power to penalize seemed vague and shadowy, while the other party's arm and navy was very concrete and real ("self-help"), and if those forces were weak, little remained to induce the head of a state to live up to his political compacts.

Promises to abide by treaty terms continued to exist, however, in a much more moderate form. Simple promise took the place for the most part of formal oath and the former accompanying ceremonials were largely dropped. Article 28 of the treaty between Portugal and Tripoli (14 May, 1799) reads, "All these articles shall remain inviolate and our faith shall be our faith and our word shall be our word."[31] A concordat between the Pope and the Kingdom of the Two Sicilies (16 Feb., 1818) provides in Article 38, "Each of the two—parties promises in his name and in those of his successors to observe exactly what is contained in these articles"[32] and in a treaty between Great Britain and the Abdalees (2 Feb., 1839) is included, "From this day and in the future Syed Mohomed Houssian etc. gives this promise to Commander Haines, gentleman, on his own head, in the presence of God, lasting friendship and peace and everything good between the English and Abdalees."[33] Article 7 of a treaty of amity and commerce between Belgium and Persia (30 December, 1842) declares as follows: "The present treaty, shall, if it please God, be observed faithfully by both parties in perpetuity,"[34] and it is in such treaties between the European powers and the so-called "backward nations" that oath and promise procedure has persisted longest. The 20th century furnishes an example of such a one in the treaty between Italy and the Mullah of the Somalis (5 March, 1905). In article 3 of this document "Said Mohammed himself and his people pledge themselves by a formal and complete pledge, as also by oath before God, to prevent the traffic, importation of slaves and fire-arms."[35] The Euro-

[31] De Martens, *Recueil*, VI, 613.
[32] *Ibid.*, III, 158.
[33] *Ibid.*, XVI, 506.
[34] De Martens, Cussy, *Rec. Manuel, etc.* VI, 13.
[35] De Martens, *Nouv. Rec. Gén.*, VI, 314.

pean states evidently no longer fear that God will wreak vengeance upon the oath breaker. Only for the "backward" states where dread of God's wrath is felt to be more pervasive has the solemn oath persisted as a suggestion of the results of violation.

(*b*) Invocation of the Deity or Deities

Frequently in addition to containing pledges to observance, treaties from early days have been linked with the religious by means of invocation to the gods. These invocations sometimes appear alone in which event the human parties signatory took no fervent oath but simply called upon heaven to witness the act and to punish the offender against its terms. Such a measure was put into service by the Egyptians in one of the earliest treaties on record, that between Rameses II and the Prince of Cheta some 18 centuries before our era. The phrasing is interesting: "May these words be protected by 1,000 gods, the male and female divinities of Cheta and by 1,000 gods, the male and female divinities of Egypt. Let them be our witnesses—The words are engraved upon a tablet of silver of the country of Cheta and upon one of the country of Egypt. Whoever shall not observe them, may 1,000 gods of Cheta and 1,000 gods of Egypt take action against him, his house, his (fields?) and his servants. Whoever shall observe these words—be he either of Cheta or of Egypt may (the gods) for him be beneficent and toward his children, their houses and their servants."[36]

Oath and invocation often appear together, however, as in the Amphictyonic pledge cited in the previous section, and in the alliance between Philip of Macedon and Hannibal (215 B.C.) in which, after the oath, it was stated that this treaty "is made in the presence of Jupiter, of Juno, of Apollo and in the presence of the divinities of the Carthaginians and of Hercules,[37] Mars" and numerous others. The galaxy of divine attendants in this case was extraordinarily large even for those days. In the Christian epoch of course one God alone is called upon but the responsibilities are the same. The treaty between Persia and the Roman (Eastern) Empire (561 A.D.) reads in part, "May God be kind and favorable to those who love and guard this peace and may He assist them in everything at all times. But for deceivers and for perfidious ones who seek to infringe these articles in the least—may He confound them and be their implacable enemy."[38]

[36] Egger, 243.
[37] Barbeyrac, I, 331.
[38] Barbeyrac, II, 12.

The treaties of the Middle Ages almost invariably began with some sort of appeal to divine protection or of recognition of divine guidance. "In nomine sanctae et individuae Trinitatis divina propitiante clementia . . ." became a standard introduction[39] which continued in somewhat varied versions until the close of the 19th century. "Au nom de la Sainte et Individue Trinité, de la Sainte Vièrge . . ." (Venice, Tuscany and Modena, 26 May, 1643)[40] was typical of the 17th century practise which was still very much in vogue in the early 19th, the alliance between Great Britain, Prussia, Austria and Russia made at Chaumont (1 March, 1814),[41] for example, beginning with wording not very different from that of the 16th and 17th centuries. Divine aid was very decidedly called into the scene by the Belgian-Tunis treaty (14 Oct., 1839) which stated in article 18 that "this treaty shall continue to have entire force, with the aid of God, in perpetuity."[42] Invocation to God as a general usage lasted longer and continued to be more frequently incorporated into treaties than did the oath previously discussed which lapsed into disuse in the 18th century except for treaties with primitive or "backward" peoples. The 1848 treaty between the United States and Mexico,[43] one between Great Britain and Santo Domingo in 1850,[44] the neutralization of Luxembourg agreement,[45] 1867, the act of the Congress of Berlin,[46] 1885, and the Anti-Slavery convention, 1890,[47] are a few of the agreements of the second part of the 19th century which stated that the document had been drawn up in the name of "Dieu Tout Puissant" or "The Holy Trinity." After 1890, however, the practise seems to have died out abruptly, one of the last treaties of this type being that between Italy and Abyssinia (26 Oct., 1896)[48] which commenced with the familiar "Au nom de la Très Sainte Trinité." Not that treaties lost a very great sanction by the omission of reference to the Deity or ecclesiastical formulae. Habit of invoking divine blessing and counsel and the weight of tradition must account for the long continuance of such reference rather than any conviction that it would deter a state

[39] E.g. Charlemagne and Pope Leo III, 800 A.D., Dumont, I, 1.
[40] Dumont, VI, 276.
[41] De Martens, *Recueil*, VII, 683.
[42] *Ibid.*, XVI, 2, 998.
[43] Martens, Cussy, VI, 199.
[44] De Martens, *Nouv. Rec.*, XV, 112.
[45] *Ibid.*, *Nouv. Rec. Gen.*, XVIII, 445.
[46] *Ibid.*, XXV, 59.
[47] *Ibid.*, 2 me Série XVI.
[48] *Ibid.*, X, 414.

considering violation. The idea of sanction was not necessarily predominant in the use of the invocation at any time. It was a harmless antique which was kept in use long after it had demonstrated its lack of any real meaning or effect, and was finally discarded when it became utterly incongruous in an age of many different religious sects, of greater skepticism, an age when politics were becoming more and more separate from ecclesiastical ties.

(*c*) Protection of the Pope

Intimately connected with the oath, one more form of religious or moral sanction occurred frequently enough to merit special attention. This was the placing of a treaty and the oath to observe it, under the special guardianship of the Pope. Here the possible penalty in the form of excommunication was more real and more objective than punishment from deities above, with whom a ruler, in all likelihood, felt that he had less direct contact. In all the treaties where oaths and appeals to God appear, undoubtedly the priests and clergy, as earthly agents of the divine rulers, by implication at least were authorized to intervene and call to account any breaker of the pledge. The religious sanction thus might be of a very tangible mundane order and not largely subjective in the conscience of the wrong doer or dependent upon some thunderbolt or cataclysm or torment after death. Direct intervention of the ecclesiastical officials was most specifically countenanced, however, in certain medieval conventions when the Roman Catholic Church was at the height of its power.

Definite evidences of this began in the 14th century when a convention between Edward III and Philip of Valois (28 Sept., 1347) was signed by several cardinals in the name of the Pope who was made protector of the treaty.[49] Also a treaty between Charles VIII of France and Robert of Scotland (28 Oct. 1371) stipulated ". . . ceste Aliance sera ratiffie et conferme de notre Saint Pere le Pappe" and both parties promised never to seek release from their oath.[50] Likewise the document of reconciliation between Louis X and the Duke of Brittany provided "que les choses dessudites seront confirmer au Saint Siège Apostolique . . . pour l'observation des choses dessusdites aux censures Ecclésiastiques."[51] Particularly lengthy and explicit on this subject was Louis XI in his treaty with Charles, Count of Charolois

[49] Dumont, I, 2, 243.
[50] *Ibid.*, II, 1, 81.
[51] *Ibid.*, II, 2, 392.

(5 Oct., 1465) in which he declared, "Nous (Louis) sommes . . . pour l'accomplissement . . . des choses dessusdites et chacune d'elles à la cohertion et contrainte de Notre Saint Père le Pape . . . en renoncant à tous droits . . . par lesquelles on pourrait en . . . venir au contraire des choses dessudites."[52]

That the Popes often took an active interest in the conventions signed under oath and given over to their keeping is evidenced by their direct interference upon several occasions. A Bull of Clement VII confirmed the treaty of Cambrai (The Ladies' Peace, 5 Aug. 1529) and called upon the Emperor and the King of France to observe it under penalty.[53] Because of the power claimed by the Pope to absolve the faithful, protection by oath was extremely uncertain. Francis I was relieved of his obligations under the treaty of Madrid and Henry II of France of his under the Peace of Vaucelles (1556).[54] This insecurity resulted often in the insertion of extra clauses in which the parties promised not to seek Papal absolution—that is, a promise not to try to break one's solemn promise.

In regard to the treaty of Westphalia of 1648 the Pope went to extreme lengths of interference by pronouncing certain of the articles "null, void, invalid, iniquitous, unjust, condemned, reprobated, frivolous, void of force and effect."[55] It is not recorded that this Papal broadside had any great effect.

As a result of the diminishing prestige of the Papacy after the Reformation and also because of the often arbitrary and capricious manner in which some Popes granted absolution, the practise of placing treaties under Papal guardianship died an unlamented death. A world religiously divided quite naturally did not continue to invite intervention on the part of the leader of a church whose political activities, even before the schism, were regarded with suspicion.

The observation of treaties from the early days of Greece and Egypt has been usually regarded as a matter of honor and such is still the case. For centuries, however, the sense of honor was supported by definite vows and religious rites, and one finds that treaty making until the 18th century, and even afterwards to a lesser extent, was regarded as a solemn religious affair. Unhappy consequences of a religious order, perhaps a pestilence decreed from above, perhaps

[52] *Ibid.*, III, 335.

[53] Dumont, IV, 2, 531.

[54] Phillipson, 277.

[55] Bougeaut, G. H., "Histoire des Guerres et des Négociations qui précédèrent le traité de Westphalie," Vol. VI, 413.

the anguish of a tormented conscience or excommunication by the Pope, were the suggested results of treaty infringement, and by oaths and invocations a ruler was made to feel the seriousness and sacredness of the obligations. Invocations, oath and guardianship by the Pope often went together in the same treaty, but more frequently the three forms were separately used and the latter two fell into disuse long before the first which became less elaborate, and which persisted quite generally as a pious relic until a relatively few years ago.

Observance of treaties today is often looked upon as a matter of honor as well as of legal duty but sanctions of a definitely religious character are no longer considered. Any formal implication of their existence by the inclusion of special oaths and references to God do not exist in modern conventions. The large democratic states of the present, acting through changing ministers and agents, cannot feel the same personal sense of responsibility before God as could an ancient or medieval monarch, and though a people may feel a moral as well as legal duty to live up to an agreement, references to divine or ecclesiastical penalties are now omitted from treaty texts. Religious sanctions were too vague and too indefinite. They would be particularly ineffective in a world where not only are there many religions but where inter-state relations are for the most part purely secular in character. Even in ancient times the inadequacies of religious sanctions for treaties were realized and were supplemented by other forms now to be considered.

*2. Hostages*

The holding of hostages as a security for the fulfillment of an engagement is a practice which dates far back into human history. Sometimes the agreement itself stated that hostages would be given or exchanged; often the practise was followed without being referred to specifically in the convention, in which case it was supplementary to the treaty after the manner of some of the formal oaths. The sanction in such an arrangement lay in the dread of the loss of the lives or services or in an injury to the men given over as a pledge of observance. The effectiveness and severity of this sanction naturally depended very much upon the standing of the men held as hostages; if they were of high rank and of great influence, their loss would be an event of considerable moment to a ruler or community violating its word. If the ruler himself were a hostage as was Croesus, King of

Lydia, who was held by Cyrus for a time after 548 B.C.,[1] one of the parties to the agreement (Croesus had renounced his right to make war) was reduced to absolute impotence and was not in a position to attempt to violate his word. He could not incur the sanction if he wanted to as he was already captured and bound.

Such drastic procedure as the holding of the sovereign himself did not constitute the usual mode of hostage giving which consisted usually in the prince or community's turning over representative citizens as a pledge. The Greeks practised this to some extent; both Plutarch[2] and Thucydides,[3] in telling of the story of the expedition against the Samians, about 420 B.C., relate how the Athenians sailed to Samos with 40 ships, set up a democracy and took hostages from the Samians, 50 boys and as many men. The record of the Greek treaties, however, shows almost no reference to the giving of hostages. The emphasis was upon formal oaths instead. It was the Romans who developed the practise of giving hostages, and their treaties abound in provisions on the subject. This may be attributed perhaps to the particular temperament of the Romans who relied less upon oaths which past practice had demonstrated to be insufficient security, and more upon a practical objective measure like the giving and taking of hostages.

In 321 B.C. occurred the incident of the Claudine forks where a large Roman army was trapped by the Samnites. The leader of the Romans signed an accord or sponsion with the chief of the enemy whereby the Romans were allowed to go free except for 600 hostages "who would pay with their heads if the Romans did not ratify the convention."[4] The Roman Senate, after the fashion of later senates, refused to ratify, sacrificed the heads of the hostages and felt free to go on with the war.

A treaty between Scipio Africanus and three kings of Spain (209 B.C.) provided that hostages should be given the Romans,[5] and the treaty bringing to a close the Second Punic War (201 B.C.) stipulated that the Carthaginians "would deliver 100 hostages whom the general of the Roman army should select from among the youths of

[1] Barbeyrac, I, 60.
[2] *Life of Pericles.*
[3] *The Peloponnesian War*, Bk. I, Chap. IV.
[4] Barbeyrac, I, 246.
[5] *Ibid.*, 339.

Carthage."[6] Antiochus of Syria in 188 B.C. gave the Romans 20 hostages and promised "to renew them every three months."[7]

The practise of hostage giving did not lapse during the empire, and numerous instances are found. Velogese, King of Armenia, in a treaty with Septimius Severus (200 A.D.) agreed to send "hostages for the greater surety of his engagements."[8] Later on, as the strength of the empire waned, hostage delivery ceased to be always a unilateral affair, for the treaty between the Emperor and the King of Persia, 363 A.D. states that "both parties will give hostages as security for the execution of their reciprocal obligations,"[9] and the situation was quite reversed after the sack of Rome by Alaric, 408 A.D. Honorius, having ratified an agreement with the barbarian leader, refused to give the promised hostages and failed to live up to the treaty. This action resulted in another siege and capture of Rome and worse terms than ever for the harassed Romans.[10]

The Eastern Empire continued to be able to demand a one-sided delivery of hostages. The Ethiopians in 453 agreed to send hostages of "high birth" to Constantinople,[11] and Vitigis, self-styled King of Italy, leader of the Ostrogoths, promised the same in 537 to Belisarius, general of Justinian who was making a vigorous attempt to reestablish Roman authority and power in the west. Narses, another of Justinian's generals, in the year 553, made an agreement with the city of Lucca whereby the latter promised to surrender in 30 days if aid from France and Germany did not arrive. The Luccans fell down on their promise and Narses resorted to strategy. The hostages were assembled on the plain, in full view of the walls of the beleaguered city, and were felled by blows of the Roman soldiers. It was a sham killing, however, because the hostages were protected by wooden blocks concealed beneath their clothing, but this fact went unperceived by the thoroughly distressed Luccans who promised to surrender immediately if the hostages were made alive again in accordance with the rather surprising offer received from Narses. The hostages accordingly were "raised from the dead," restored without ransom, and the overjoyed and considerably amazed city capitulated without more delay.[12]

[6] *Ibid.*, 342.
[7] *Ibid.*, 368.
[8] Barbeyrac, II, 32.
[9] *Ibid.*, 60.
[10] *Ibid.*, 70.
[11] *Ibid.*, 95.
[12] Barbeyrac, II, 190.

In medieval times and down to the middle of the 18th century, the giving of hostages was a relatively common occurrence and writers like Vattel devoted a considerable amount of space to the practise, discussing methods and treatment after delivery at length.[13] One of the earlier medieval treaties in connection with which hostages were used was one between Charles the Fair of France and Edward IV of England (22 Sept., 1324) by which the English gave four knights as hostages for the delivery of the city of Reolle to France.[14] The use of hostages was rather elaborately provided for in an agreement between Edward, Prince of Wales, and Charles, Dauphin, (8 May, 1360) for the release of John, King of France. Art. 15 stated that ". . . the person of the king shall be delivered from prison and may depart freely from Calais, but he can arm neither himself nor his men against the King of England . . . and for this stipulation the following are hostages: (follows a long list of French nobles). In article 18 it was further stipulated that "the King of France shall deliver at Calais four gentlemen of Paris and two from each of the following 19 towns and cities for the greater security of this treaty."[15]

Again in 1524, the King of France, Francis I, was in the power of a foreign sovereign, this time, Emperor Charles V, and by a treaty of peace (14 Jan. 1525) was allowed to go home only upon condition that a number of gentlemen of France go to Germany as pledge of his good behavior.[16] Three years later, 1528, by treaty with Henry VIII, Francis received a whole delegation composed of two archbishops, 11 bishops and 28 nobles which Henry sent over as hostages for the performance of his treaty obligations.[17] For treaties between European and non-European states, hostages were also used as is evidenced by the agreement of 21 March, 1619 between Louis XIII and Bacha, Dey of Algiers, by which the latter contracted to send "two persons of quality who shall reside at Marseilles as hostages."[18] The practise also was not foreign to the Papacy, and in a concordat between Urban VIII and the "Confederated Princes of Italy" (31 March, 1644) an interesting variation is found. Both parties gave hostages, not in the form of a simple exchange, each to the other, but to the king of France who thus became a sort of trustee for the agreement.[19]

[13] *Law of Nations*, Bk. II. XVI, pars. 245–261.
[14] Dumont, I. 2, 71.
[15] *Ibid.*, II, 1, 7.
[16] Dumont, IV, 1, 399.
[17] Phillipson, 208.
[18] Dumont, V, 2, 330.
[19] *Ibid.*, VI, 1, 207.

Rather widely used during the 14th and 15th and 16th centuries, hostages came in for less frequent employment in the 17th century and disappeared entirely in the 18th. Emperor Ferdinand II and Louis XIII by the treaty of Ratisbon (13 Oct., 1630)[20] exchanged hostages but in the conflicts and resultant treaties from Westphalia, 1648 to Utrecht 1713, virtually no mention of them in treaties is discovered. What had happened? Like the oath, they had been found none too efficacious in preventing violations; other expedients were being resorted to such as guarantees and pledges of territory, towns and goods. Perhaps, too, it became increasingly difficult to get or to force estimable gentlemen to act in the capacity of hostages. The sense of personal slavish obedience to one's lord, such as a ruler in earlier times had been frequently able to expect, was on the wane and the sending abroad to exile of busy men seemed a cumbersome and antiquated procedure when other means of securing observance were at hand. The exchange or giving of hostages always presented difficulties. It has already been related how Honorius refused to render up the hostages he had promised Alaric in 408,[21] and Vattel tells the story of how King Christian II of Denmark, pretending that he intended to land at Stockholm, received hostages from Sterno, administrator of the city, as a guarantee of good treatment during the visitor's sojourn, and then sailed off, hostages and all, with the first favorable wind, without ever having disembarked at all.[22] How to get hostages back when there has been faithful performance?[23] How to make sure they are delivered once they have been promised?—a "sanction for sanctions" problem analogous to what the League of Nations faces in regard to the engagements under Article 16 of the Covenant. These are some of the problems which inevitably arise when hostages are used. The sanction is far from being an automatic one.

Humanitarian principles also enter in: is it right that the lives of a few picked men should be placed in jeopardy and perhaps sacrificed if the whole state for which they are not responsible fails to keep its word? It doubtless began to seem somewhat harsh and barbarous to to subject men of eminence to such dangers.[24] Then, too, the receiving

[20] *Ibid.*, v, 2, 615.

[21] See page 97.

[22] *Law of Nations*, Bk, III, II, XVI.

[23] *Ibid.*

[24] For such considerations see Grotius, Bk. III, xi, par. 18; Vattel, Bk. II, xvi, par. 259.

state at times must not have relished greatly the responsibility for the safety and welfare of the hostages given to it, that safety and welfare concerning which Vattel treats so fully.[25] Injury to a hostage, in the days when they were used, would constitute a breach of the law, which breach in turn might lead the hostage giving state to threaten force and thus a complicated and almost endless round of activities would be inaugurated.

Whatever the reasons, whether because hostages had not proved successful as sanctions, because other measures began to appear more effective and less bothersome to invoke, or because of the difficulty of sending worthy men abroad and of getting them back again, or because of humanitarian considerations, the use of hostages came to an end soon after the middle of the 18th century. The last time they were employed between great powers was in connection with the treaty of Aix-la-Chapelle of 18 Oct., 1748 between Great Britain, France and the Netherlands.[26] Under Article 8 of this treaty Great Britain gave two hostages to France as a pledge for the restitution of Cape Breton island. Lords Sussex and Cathcart were despatched to France as the hostages and were sent back in July 1749, scarcely nine months after the signing of the treaty.

A final use of hostages is found in a treaty between Great Britain and the Senaca Nation of Indians, made in 1764, Article 8 of which reads, "For the due performance of these articles, the Senacas are to deliver up three of their chiefs as hostages who are to be well treated and restored to them as soon as the same are fully performed in all their parts."[27] That apparently marks the end of hostages as a treaty sanction. Hostages have been used since upon occasion, but any formal record of such usage in connection with treaties has not been discovered.

From Greek and Roman days down to 1764 the giving of hostages existed as a sanction for treaties, the sanction consisting in the dread of the non-return of or in the injury or harm to the men sent as hostages, in the event of violation. Hostages sometimes were given only unilaterally where one of the parties was predominately the stronger; at other times when the contractants were on an approximately equal footing the hostages were exchanged. There is also at least one in-

[25] *Ibid.*

[26] De Koch, *Historie Abrégé des Traités de Paix*, II, 420. Spain, Genoa and Austria later acceded.

[27] De Martens, *Recueil*, I, 220.

stance where both parties placed hostages in the care of a third party.

No one reason seems to exist for the end to the use of hostages in the 18th century. Its cumbersomeness, wastefulness and uncertainty —the right men had to be found and made to go and to sacrifice their time and energies in exile abroad, a ruler might fail to deliver as promised or might not make return as agreed upon; its apparent lack of effectiveness in stopping violations; the readiness at hand of other sanctions; the unfairness of making a few men scape-goats for the whole nation; and the responsibilities placed upon the receiving state probably all contributed to its abandonment.

### *3. Release of Vassals and Subjects from Obligations: Use of "Conservatores"*

A form of treaty sanction which is now only a matter of historical interest was the use during the Middle Ages of vassals and specially designated "conservatores" in the enforcement of treaties. These vassals and "conservatores" were really guarantors of the treaty terms and the arrangement was analogous to that of the third party guarantee later discussed. Instead of a third state or prince assuming the responsibility for observance, the duties were assigned to individuals and subjects within the state. With allegiance and obedience upon a personal, contractual basis, the loss of that support in case of violation would seem to have constituted a rather severe sanction for a monarch flouting a treaty's provisions. As with the third state guarantee, the effectiveness of the sanction depended upon the sense of responsibility and the influence and power of the vassals and subjects acting as guarantors.

In some conventions where this sanction was employed one of the signatories swore that if he violated the terms, his subjects were to be released from their obligations to him and were to assist the injured party. Such was the case with a treaty between Louis IX of France and the Countess of Flanders (April 1225)[1] in which it was stated "that the nobles and commoners of Flanders shall be obliged, if the Count and Countess of Flanders or their heirs and successors, contravene the terms of this peace, to abandon the said Count and Countess and adhere to the party of the King." Similar terms appear in a treaty between the King of France and the King of England, (28 May, 1258)[2] and also in one between the same parties in the fol-

[1] Dumont, I, 163.
[2] *Ibid.*, 207.

lowing year (13 Oct., 1259).[3] In this latter Henry III of England specified exactly what the obligations of his "guarantor" subjects were to be.[4] In all these treaties the sanction operated only unilaterally; in none of them was the King of France to be held to account by his own subjects.

Sometimes, instead of being obliged to take sides with the opposite party when their own ruler had infringed upon a treaty, the subjects were merely to be released from their obligation to aid their sovereign and were not bound actively to assist the other signatory. Instances of this occur in a treaty between Henry, Count of Luxembourg, and Ferry, Duke of Lorraine (14 August, 1266)[5] where Henry declared that "if this covenant is not observed as it is here written, they (my subjects) shall not be obliged to aid me . . . with counsel or with any form of assistance whatsoever until the wrong shall have been repaired," and also in a treaty between Philip, Regent of France and Eudes IV, Duke of Burgundy (17 June, 1316).[6] As late as the 17th century a ruler swore that if he violated the terms of the agreement he would forfeit the allegiance of his subjects who were to be no longer bound to obey.[7]

In the 15th and 16th centuries it became the practise to designate certain individuals specifically as "conservatores."[8] No new principle was introduced here; the conservators were appointed to act against

[3] Dumont, I, 1, 210.

[4] ". . . Et la forme de la seurete des hommes et des villes pour nous sera telle; Ils jureront qu'ils ne donnerent ne conseil, force, ne ayde la paix et s'il advenoit, que Dieu ne veuille, que nous ou nostre hoir vinssions allencontre et ne voulsissions amender puis que seurete auroient faicte dedans 3 mois, qu'ils en auroient faict requerre, feroient tenus d'estre aydans au Roy de France et a ses hoirs contre nous et nos hoirs, jusques a tant, que cette chose fut amende suffisament a l'egard . . . du Roy de France . . . et fera renouvelle cette seurete de 10 et en 10 ans.

[5] *Ibid.*, 224; see also treaty between Margaret of Flanders and Florent of Holland, (1256), *ibid.*, 205.

[6] Dumont, I, 2, 31.

[7] Duke of Brunswick and City of Brunswick (31 December, 1615). *Ibid.*, V, 2, 277.

[8] Example: Peace treaty of Etaples (3 November, 1491) between Charles VII of France and Henry VII of England. ". . . quod pro firmiori et inviolabili praedictorum Pacis, Amicitiae et Foederis observatia et observatione, electi et nominati sint ex parte. . . . Regis Franciae Conservatores subsequentes. ("Conservatores" were named for England too). . . . Qui quidem Conservatores dictorum Principum . . . aut unus ipsorum exparte saltem Principis . . . damnificantium, qui super hoc requireteur vel requirentur, habeat seu habeant auctoritatem et potestatem, virtute huius Tractatus, ipsos damnificantes coram se vocandi, conveniendi et examinandi et ipsos examinantes, secundum quod Justitia exigit, convertendi et puniendi, attentata et damna contra vires huius Tractatus illata una cum expensis damnificatorum reficiendi et reparandi. . . ."

a violator of the treaty just as the "nobles and commoners" were supposed to do in the previously cited conventions. The distinctive feature of the system lay in the fact that each party selected a group of conservators which meant that the sanction was designed to operate bi-laterally and not in favor of one party only. In case of infraction, the conservators designated by the party guilty of violation were to coerce their sovereign and join in assisting the wronged party in securing reparation and proper amends for the harm done. In some cases the Pope was named a "conservator" thus bringing in a possible ecclesiastical as well as lay factor. This happened in a treaty between Francis I of France and Charles of Castile (13 August, 1516)[9] in which the princes and electors of the Holy Roman Empire were also named "conservatores," all in addition to a list of subjects of each party appointed in that capacity. Third state guarantee and religious sanction hence were sometimes linked together closely with the system of "conservatores."

The practise of using subjects as guarantors the loss of whose support or whose assistance to the other party constituted the sanction for treaty violation came to an end with the passing of the feudal system and of the notion of the "divine right of kings." When the ruler ceased "to be the state" and to have the sole responsibility for its actions, and when whole nations as such were deemed to be bound by a treaty which was no longer a personal, more or less private affair between monarchs, any such sanction as that here treated became obviously impossible.

### 4. *"Self-Help" Measures*

#### (*a*) Authorization of "Self-Help" by Treaty

It has already been observed that the sanctions of international law are at the disposal of any state wishing to take action against a treaty-breaker. The whole gamut of measures from minor to major, rupture of diplomatic relations to declaration of war may be gone through as desired. Such is always understood to be the case with regard to treaties, but in some conventions it has been explicitly stated what the injured party may do if any of the provisions suffer infringement. The said injured party receives nothing that it did not have before except a precise authorization in the treaty which thus may

[9] *Ibid.*, IV, 1, 224; Conservators also were used in a treaty between Louis XII and Henry VIII, (7 August, 1514) *Ibid.*, 183; between Charles VIII and Maximilian, (Peace of Senlis, 23 May, 1492) *Ibid.*, III, 2, 303.

give it extra grounds upon which to justify the course later determined upon. In some of the treaties discussed in another section collective employment of force is authorized, multi-party treaties mainly being considered. Here it is individual application of force that is authorized, force which may be invoked by each party, without reference to what the other contractants may do, or by the party to a bilateral agreement where the other signatory has failed to abide by the stipulations.

An early example of what is meant occured in a treaty between Romulus and Alba (approx. 741 B.C.) which stated, "that the states, Rome and Alba, shall refrain from going to war against each other, and that if some subject of complaint shall arise between them, the injured party shall demand satisfaction therefor from the other, and if this is not obtained, the alliance being considered at an end, the people to whom justice has been refused, shall be authorized to take up arms, being by necessity forced to resort to such measures."[1] Not that either party would not have considered himself "authorized" by usage and custom (by international law in later centuries) to take up arms if the other had broken the engagement; the treaty merely gave additional weight and sanctity to that authorization. Similar sort of authorization, this time in a multilateral convention, however, was given by the pact of peace made between several cities of Greece in 372 B.C.[2] which declared, "that if any of the contracting parties contravene any of these articles, it shall be permitted to the others to use what means they desire to aid the injured parties." This looks very much like a collective guarantee or a pledge for joint action, but the significance of this type of provision lies in the fact that the wording specifies only what a party "may" do, not what is mandatory as with guarantee and the pledge. The trouble with the latter two is that they are so likely to turn out in practise to be the type that is under consideration here, namely, what a party may do, not what it is obliged to do. The military and naval sanctions provisions of article 16 of the Covenant, as emasculated by the 1921 resolution, leave the application of measures very much up to the discretion of each signatory after the manner of the Greek treaty quoted above.

Coming to the modern era, it was sometimes the practise to authorize the use of letters of marque and reprisal where particular provisions of a treaty had been violated, article 3 of the treaty of peace

[1] Barbeyrac, I, 27.
[2] Barbeyrac, 201.

between France and England (3 Nov., 1644)[3] affording an instance of this when it said, ". . . and whatsoever shall be taken after 14 days next ensuing the publication of this treaty shall be restored within three months, but if legal satisfaction be refused either party may issue letters of marque and reprisal to affect only the particular delinquents, not the effects of the subjects of either unconcerned."

Authorization of measures of retaliation, however, were not confined merely to treaties of peace and political arrangements. They appeared also in commercial treaties such as that between England and Portugal (27 Dec., 1703) by Article II of which Britain agreed not to tax Portuguese wines more than French and in which it was further provided that "if at any time this. . . be prejudiced it shall be just and lawful for His . . . Majesty of Portugal again to prohibit the woolen cloths and the rest of the British woolen manufactures."[4] Thus commercial treaties may specifically authorize retaliation or retorsion though in connection with such types of pacts it is always understood that the sanction of retaliation mentioned with regard to international law in general is applicable. A violator of a treaty of commerce, a customs agreement, for example, knows that the other party may take steps to reply in kind, (retorsion) whether authorized by the treaty or not[5] and to go further if it deems such a course is advisable.

Instances of the authorization of the use of force in the event of infraction are found in a variety of treaties of relatively modern date.[6] One of the most striking of these is a provision in the agreement between Great Britain and Nicaragua (7 March, 1848)[7] in regard to the port of San Juan, in article 3 of which "The government of Nicaragua solemnly promises not to disturb the peace of the inhabitants of San Juan, knowing that such an act will be considered by Great Britain as a declaration of war."[8] The sanction here is quite appar-

[3] Horsley, 78.

[4] Horsley, 315.

[5] See *Acad. de Droit Int., Res. des Cours*, 1924, III, pp. 153–157 where positive sanctions for economic treaties are discussed. These are held to be (a) release of others from their obligations. (b) retorsion in customs. (c) non-execution. See Articles 409–420 Treaty of Versailles, also Boris Nolde in *Acad. de Droit Int., Rec. des Cours*, 1924, II, pp. 437–455.

[6] E.g. Holland and King of Candy in Ceylon, 14 February, 1766, Art. XXV. De Martens, *Rec.* I; Sardinia and Tunis, 17 April, 1816, Art. VI, *Ibid., Rec. Nouv.*, Suppl. I, 487.

[7] De Martens, *Nouv. Rec.*, Vol. XV, 177.

[8] Compare with declaration of the powers in treaty of 1856.

ent. Nicaragua might fear war in case of infringement without such a precise article, but the British position is made explicit by the treaty terms which provide a concrete and easily understood sanction.

A somewhat similar sort of unilateral sanction is found in Part VIII of the treaty of Versailles[9] wherein the Allied and Associated Powers are authorized to take certain measures in case of voluntary default by Germany in the performance of the reparations obligations.[10] France justified the occupation of the Ruhr in 1923 upon the basis of these provisions but the British government held the action to be illegal by a different interpretation of the treaty.[11] The Germans of course asserted that such sanctions, because they work only one way are not "legal"[12] and that to be of that character they should operate in both directions. Whether "legal" or not in the strict sense, they are treaty sanctions. In so far as the Allied and Associated Powers act together, the sanctions provisions here are analogous to the collective guarantee discussed later, like that in the 1856 treaty,[13] but where the Allied parties do not act in unison, as in the Ruhr episode, it is an individual authorization of the use of force and so comes into line with the provisions considered in this section. Article 44[14] of the treaty, furthermore is comparable to the "casus belli" clause of the treaty of 1856[15] and the "declaration of war" stipulation in the British Nicaragua convention: a fairly easily distinguishable type of violation is provided and the sanction, for Germany, of Allied action is manifest.[16]

[9] De Martens, *Nouv. Rec. Gén.* 3 me série, Vol. II, 323. Part VIII, Section I, Annex II, pars. 17–18.

[10] *Ibid.*, par. 18, "The measures which the Allied and Associated Powers shall have the right to take in case of voluntary default by Germany and which Germany agrees not to regard as acts of war, may include economic and financial prohibitions and reprisals and in general such other measures as the respective governments may determine to be necessary in the circumstances." See page 159 for a fuller discussion of these provisions and for the controversy concerning economic and financial prohibitions and reprisals.

[11] The English contended that "economic" and "financial" applied to reprisals as well as prohibitions while the French asserted that "reprisals" stood by itself and was not modified by economic or financial.

[12] See Bergmann, *op. cit.*

[13] See p. 128.

[14] Par. III "In case Germany violates in any manner whatever the provisions of Arts. 42 and 43 (re neutral, demilitarized zone east of the Rhine) she shall be regarded as committing a hostile act against the powers signatory of the present treaty and as calculated to disturb the peace of the world."

[15] See p. 128.

[16] See also Protocol at Spa—9–16 July, 1920. De Martens, *Nouv. Rec. Gén.* 3 me série, Vol. XIII, 618; Part VIII, Treaty of St. Germain, 10 September, 1919. Par. I, Annex

In the Hague Conventions of 1907 authorization of individual acts of retaliation has been granted in several instances. For example, Article 40 of Convention IV[17] reads, "Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even in cases of urgency, of recommencing hostilities immediately;" Art. 10 of Convention V[18] "The fact of a neutral Power resisting, even by force, attempts to violate its neutrality can not be regarded as a hostile act." (The neutrality is guaranteed by article 1); and Article 3 of Convention XIII.[19] This type of authorization is somewhat different from that under discussion in the paragraphs just preceding because the Hague Conventions are "law making" treaties and these measures permitted are means granted for law enforcement; they are not simply treaty sanctions in the strict sense, but sanctions of the law. In the absence of a superior law enforcing organization the task of law enforcement is given over to individual states; they are treaty grants of legal "self-help."

In another "law-making" treaty the Radiotelegraphy convention (3 Nov., 1906)[20] individual self-help in the way of retaliation is countenanced by par. 2 of Art. VII.[21] Definite penalties imposed by sovereign authority cannot be inserted in conventions declaratory of international law, but sanctions are provided, that is measures to induce conformity, by the specific authorization of actions which the individual signatory parties may invoke in case of infraction.

(b) Stipulations for delay in the employment of "Self-Help"

There remains to be mentioned the provision for the delayed application of force and measures of coercion found in many conventions from medieval to modern times. This provision is significant not because it furnishes an additional sanction, for it does not, but because it demonstrates clearly that in the minds of the negotiator the real sanction for treaties, that which induces conformity, is the

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II, pars. 17–18 like those in treaty of Versailles. De Martens, Vol. XI, 691; Treaty of Sèvres, 10 August, 1920. Part VII, *ibid.*, XII, 664; Treaty of Trianon, 4 June, 1920. Art. 157. *Ibid.*, 423.

[17] "Concerning Laws and Customs of War on Land." J. B. Scott, Collection, *op. cit.*

[18] "Concerning Rights and Duties of Neutral Powers in Case of War on Land." *Ibid.*

[19] "Concerning Rights and Duties of Neutral Powers in the Event of War at Sea." *Ibid.*, Art 3, "When a ship has been captured in the territorial waters of a neutral Power, this Power must employ, if the prize is still within its jurisdiction, the means at its disposal to release the prize, etc."

[20] De Martens, *Nouv. Rec. Gén.*, 3 me Série III, 147.

[21] See also page 188.

fear of the use of force by the injured party where violation has occured. The fact is recognized that the party suffering injury may take steps to vindicate its rights and the thought behind the provision here considered evidently is to delay the invoking of such measures until it is clear that a breach has occured and that the force is to be used for legal, not purely political, ends.

A medieval example of such a provision is furnished by Article VII of a treaty of alliance between Jean, Duke of Lorraine and Louis, Count of Flanders (3 Dec., 1339)[22] which stated that if a violation were made on the part of either contractant there should be no war and no reprisals unless demands for reparation had first been formally made and justice asked for.[23]

During the 19th century a provision of this sort was placed by the United States in many treaties with foreign states, particularly with Latin American countries. A definite formula came into use and the following in the agreement between the United States and the Federation of Central America (28 Oct., 1826)[24] is typical: "If unfortunately any of the articles contained in the present treaty shall be violated or infringed in any . . . way whatsoever it is expressly stipulated that neither of the contracting parties will order or authorize any acts of reprisal nor declare war against the other on the complaints of injuries or damages until the said party considering itself offended shall first have presented to the other a statement of such injuries and damages verified by competent proof, and demanded justice and satisfaction and the same shall have been refused or unreasonably delayed."[25] Ultimate recourse to force is thus recognized

[22] Dumont, Vol. I, Pt. II, 182.

[23] See also Charles V and Mary of Scot., Treaty of Peace (15 December, 1550). *Ibid.*, Vol. IV, Pt. III, 14. Emperor and Regent of Tunis (23 September, 1725) Art. XI. *Ibid.*, Vol. VIII, Pt. I, 129; Russia and Sweden (5 August, 1735) Art. XIX. *Ibid.*, Supplement Vol. III, p. 536; England and Spain (18 July, 1670) Article XIV, Horsley, 168; Great Britain and Spain (28 October, 1790) *re* Nootka Sound. Article VII; De Martens, *Rec.*, Vol. II; Spain and Tripoli (10 September, 1784) Article XXXVIII, *ibid.*, United States and Morocco (25 January, 1787) Article XXIV, *ibid.;* Sweden and Algeria (25 April, 1792) Article XXII, *ibid.;* United States and Six Nations (11 November, 1794) Article VII, *ibid.*

[24] Article XXXIII, De Martens, *Nouv. Rec.*, Vol. VI, Part II, 826.

[25] Similar articles were placed in U. S. treaties with Brazil (18 March, 1829), *ibid.*, Vol. IX, 54; Mexico (5 April, 1831), *ibid.*, Vol. X, 322; Chile (16 May, 1832), *ibid.*, Vol, XI, 438; Venezuela, (20 January, 1836), *ibid.*, Vol. XIII, 544; Bolivia (13 November, 1836), *ibid.*, Vol. XV, 113; Portugal (23 April, 1841), *ibid.*, *Nouv. Rec. Gén.*, Vol. I, 338. See also Art. XXI U. S.—Mexico (Peace of Guadeloupe-Hidalgo) (2 February, 1848). De Martens, Cussy, Vol. VI, 149.

but its application is to be retarded. Each party of course for itself determines the question as to what constitutes unreasonable delay. The "self-help" situation is unaltered except that there has been an effort to curb the irresponsible use of force.

This provision acknowledges that the sanction for the whole treaty lies in the dread of coercive measures applied by the other party, but what is the sanction for the provision itself? What induces a party believing itself to have suffered an injury to conform to the procedure as outlined in the article? The answer is, simply: the sanctions of the law—public opinion, sense of right, etc. treated in an earlier chapter.

Articles calling for the delayed application of retaliatory measures had wide vogue during the last century, France in particular using them extensively in many agreements.[26] Sometimes, however, a more drastic step was taken, both signatories promising never to go to war or resort to arms if the treaty terms were infringed.[27] Supposedly, if this provision were observed in good faith, armed action was removed as a treaty sanction, and other sanctions had to be relied upon. Fear of force remains, however, as a sanction for this article itself.

The so-called Bryan "cooling off" treaties[28] present a different question for they were concerned not with the delayed application of measures for the violation of a particular treaty, but with retarding the use of force in the settlement of any and every sort of dispute. An article like that in the convention between the United States and Central America, just cited, pertained to the threatened use of force as a sanction for that particular convention, but the Bryan accords were designed for a much wider field, and only incidentally covered disputes in regard to treaties. They related not only to the dread of force as a treaty sanction, but to such dread as a sanction of the law in general. No specific sanctions (treaty sanctions as such) were mentioned in the Bryan agreements themselves, to induce conformity.

[26] France and Venezuela (25 March, 1843) De Martens, Cussy, Vol. v, 290; France and Ecuador (9 November, 1844), *ibid.*, 320; France and New Grenada (4 June, 1846), *ibid.*, 647; France and Guatemala (8 March, 1848), *ibid.*, Vol. III, 225.

[27] E.g. U. S. and Tripoli (4 November, 1796), De Martens, *Rec.*, Vol. I, Art. XXII "In case of any dispute arising from a violation of any of the articles of this treaty no appeal shall be made to arms nor shall war be declared upon any pretext whatsoever." Also, Art. XVI, U. S. and Algiers (30 June, 1815), Malloy, Vol. I, 8; U. S. and Algiers (11 February, 1832), De Martens, *Nouv. Suppl.*, Vol. III. Suppl. 6.

[28] E.g. U. S. and Bolivia, (22 January, 1914), De Martens, *Nouv. Rec. Gén.*, 3 me série, Vol. IX, 69 U. S. and Guatemala (20 September, 1913), *ibid.*, p. 66—U. S. and France (15 September, 1914), *ibid.*, p. 106. Art. 11, par. 2—"The High Contracting Parties agree not to resort in respect with each other to any act of force during the investigation to be made by the commission and before its report is handed in."

Observance rested upon the broad sanctions of the law. The same applies to the Treaty for the Pacific Settlement of Disputes Between American States signed at Santiago, 3 May, 1923[29] which arranged for commissions of inquiry in case of disputes, and by which the states agreed not to commit any hostile acts, mobilize any troops, or prepare for any military action until after the commission had given its report.[30]

The authorization of specific measures of force to be taken in the event of violation adds nothing new in the way of a treaty sanction, it being generally understood that an injured party may resort to force if it considers that the situation requires such action. The fact, however, that many treaties, ancient and modern, directly countenance the use of arms if the treaty is contravened, emphasizes clearly that the threat of force is a treaty sanction as well as a sanction of international law in general. The fact also that many treaties stipulate that force shall not be used, in case of infraction, until after the lapse of a certain period or not at all, is evidence again that makers of treaties regard the threat of force as a very real treaty sanction.

5. *Pecuniary Loss and Liability to Make Reparation*

In drafting treaties the parties have sometimes agreed to make reparation for any injury resulting from violation of the terms of the convention. This promise has most often been made in vague and very general terms, though in a few instances specific sums have been designated as penalty-payment for a breach. Examples of the indefinite agreement to make reparation begin in the 15th century[1] and are found fairly abundant during the succeeding 200 or 300 years.[2] Fairly typical is Art. LXXVI of the Treaty of Munster (United provinces and Spain)[3] which reads "(the parties) also promise they will neither act nor suffer anything to be acted directly or indirectly contrary to this treaty, but if anything should be so acted they will order immediate satisfaction to be made, and oblige themselves re-

[29] Le Fur et Chklaver, *Rec. de Textes de Dr. Int. Public*, 636.

[30] Art. I. This treaty was amplified and given broader scope by the Inter-American Conciliation treaty signed at Washington, 5 January, 1929. U. S. Treaty Series No. 780.

[1] Henry IV of England and Jean, Duke of Normandy (10 March, 1407), Dumont Vol. II, part I, 302 "S'il avenait . . . que par aucune, de l'une couste ou de l'autre aucune chose fuisse fait ou attempte contre l'estat de cest present accord et seurtee . . . ne ferra ne meu, mais sera le fait repare par les seigneurs de l'une et l'autre Partie , et mis en son primer estat et deu."

[2] See *ibid.*, Vol. III, 142; *ibid.*, 505.

[3] Signed at Munster, Horsley, 7.

spectively to observe all that has been above said, renouncing all laws, customs, etc. to the contrary." In the Peace of the Pyrenees between France and Spain (7 Nov., 1659)[4] Art. XXI declared, "If any contravention should happen as to these articles of commerce, upon complaing, immediate reparation shall be made" and Art. XXXVI of the Peace of Nimeguen between France and the Netherlands (17 Sept., 1678)[5] stated that "If anything should be wanting in the observance of this treaty, it shall not cause a breach, but reparation shall be made for the contravention."

The sanction here, which consists of the fear of having to make some sort of amends, pecuniary or otherwise for an infringement, appears not to be particularly forceful. The examples just cited are really nothing more than a reciprocal promise to live up to the treaty with indefinite words about reparation added thereto. The sanction for sanctions problem comes clearly to the fore; how is the violator party to be made to render the atonement stipulated? Additional sanctions such as the fear of armed measures by the injured party would apparently be needed to obtain the reparation due. The promise by itself is unsubstantial. Similar difficulties arise in connection with a more modern instance of indemnity promises found in Article 3 of the Hague Convention IV of 1907[6] which says "A belligerent party which violates the provisions of the said regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." State responsibility for the acts of its agents is made plain, but how much of a sanction is establishd by such a provision? The fear of having to make indemnity for acts counter to the treaty might operate to induce a state to conform to the articles of the convention, but for a large state today, could that fear be very great unless there were armed forces to back up the demands for reparations? During war time when the acts would be committed, collection obviously would be impossible. After the conflict, if the state violating the convention is the victor, is it going to pay the losers an indemnity? Most probably not. If the infringing state is defeated, reparation for all sorts of things including infringements of the conventions, would in all likelihood be demanded. If such reasoning be valid, Article 3 be-

[4] Horsley, 101.
[5] *Ibid.*, 188.
[6] "Convention Concerning the Laws and Customs of War on Land." J. B. Scott, Collection, *op. cit.*

comes almost meaningless: in one situation no collection is possible; in the other it would doubtless be called for anyway. Here again a treaty sanction has to rely for its efficacy upon the sanctions of the law, chiefly force.

In some treaties, a definite sum to be paid by a violator party was promised. This was particularly the case in medieval arbitration compromis in which penalties to insure enforcement of the awards were considered essential,[7] and specific fines were also included in some other types of convention.[8] An example of such a one is found in a convention between Charles I of England and Louis XIII of France (8 May, 1625)[9] who were contracting the marriage between Charles, and Louis' sister, Henriette-Marie. Article XXVI of this convention stated that "Celui des deux rois qui viendra à manquer à l'accomplissement du présent mariage sera tenu et obligé de paier la somme de 400,000 écus, comme pour la peine du dedit."

Again, one can only ask, "How to collect?" If either Louis or Charles had failed to carry through the terms agreed upon, would the defaulting party spontaneously render up the 400,000 écus unless under the threat of strong pressure? Simple promises by themselves do not constitute really strong sanctions without something more behind them.

The stipulation that reparation, pecuniary or otherwise, shall be made if a treaty's terms are contravened does not constitute a sanction of any real vigor. If a party feels in a position to violate a treaty in the first place, it is not apt to render up gratuitous reparation; it probably would have to be coerced into performing as it had promised. And if the injured parties are in a position to do the coercing, the original violation probably would not have taken place. As with Art. 3 of Hague Convention IV, a violator party most probably would have small fear of having to make reparation because, if it felt strong enough to infringe the treaty originally, it would feel strong enough to disregard the reparation provisions. If it were not strong enough to violate the agreement with impunity, it doubtless would have to make remuneration anyway. Either way, the sanction is of almost negligible deterrent value.

In connection with pecuniary sanctions, it may be asked what are

[7] For examples see J. H. Ralston, *International Arbitration from Athens to Locarno* p. 187.

[8] *Ibid.*

[9] Dumont, Vol. v, Part II, 476.

the sanctions for international engagements calling for monetary payments between nations? The collection of debts between nations is a delicate and difficult matter. In some instances the state itself may be the creditor or it may take up as its own the claims of its nationals who have loaned funds. Debtor states often have been reluctant to fulfill their obligations but various sanctions, from the fear of force to the feeling of a sense of honor have operated to induce conformity to financial obligations. Where the obligation to make payment has not been embodied in treaty form, sanctions of the general law apply;[10] but where the arrangements for payment have been drawn up as a treaty, a special treaty sanction may be employed. Article IV of an agreement between Great Britain and the Emperor of Germany, 4 May, 1795,[11] stated that "If the holders of the securities remain unpaid, they may sue the receivers or treasurers of the Imperial Revenue the same as private persons in the empire may sue other persons." In other words, if the Empire should default it could not claim exemption as a sovereign state, having renounced such immunity by Article 4 of the above treaty, and the English creditors might sue for collection without hindrance. The knowledge on the part of the Emperor that such suit might be brought would be a sanction for the treaty in question. It would serve as an inducement to keep the treaty.

This device, as far as has been discovered, seems not to have been widely employed in other international arrangements providing for financial payments. The right to sue freely in the courts of the debtor state probably did not seem of great value to a powerful state dealing with a weaker nation whose sense of responsibility and whose court procedure were considered unreliable. Where the dealings were between states of relatively the same influence and prestige a sanction of this sort may have seemed unnecessary or too undignified to concede, and hence was not used. Perhaps the matter was not often considered, but if it was, an explanation like the one just given may be somewhere near the truth.

Fear of force, the ultimate sanction of the law in general, seems to have been relied upon for the collection of debts until in recent years with the signing of the Hague (Porter) Convention[12] and the develop-

[10] See *French Republic* v. *Board of Supervisors of Jefferson County*, 200 Ky. 18.

[11] De Martens, *Rec.*, Vol. III.

[12] "Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts." See Higgins, *The Hague Peace Conferences*, 180.

ment of arbitral and judicial machinery, an international judicial sanction has been substituted in part for military or naval action. Since 1921, by signing the "optional clause"[13] of the Statute of the Permanent Court of International Justice, a judicial sanction for debt payment is made possible. Whereas the Treaty of 1795 provided that the Emperor could be sued freely in his own national courts—a domestic judicial sanction—the "Optional Clause" sets up an international judicial sanction. States, signatory to the clause, who default in their monetary engagements, may be hailed before the World Court by a creditor nation, and the knowledge of such a possibility is the sanction for payment provided by the present day organization of international society. It is not a sanction of a particular treaty containing promissory stipulations of a financial character, but it is a sanction of the law in general which embraces treaties along with other subjects of international law. Force to collect debts hovers in the background as always, but it is removed from the foreground of the picture by the preliminary judicial sanction instituted since 1921.

The Treaty of Versailles authorized special measures on the part of the Allies in the case of default in reparation payments by Germany, a topic elsewhere discussed,[14] but provisions of the Dawes and Young Plans later substituted an arbitral or judicial sanction for the former type of measure.[15] For the so-called War Debts, obligations specified in the funding agreements,[16] a judicial sanction is out of the question both because of the non-membership of the United States in the Permanent Court of International Justice and because of the political nature of the agreements. The strongest sanction is the sense of honor, a large factor in the case of Great Britain, and this of course fails to operate strongly for the French who feel it is no dishonor to stop payments after reparations have ceased. A force sanction is out of the question in the case of the War Debts.

The device of a state's making itself specially liable to suit in the case of a financial convention has been very little used, only one real instance of its employment having been found. The setting up of the Permanent Court of International Justice, however, and the signing of the compulsory jurisdiction clause (Art. 36) of the Court's

[13] Article 36.

[14] See p. 106.

[15] *Ibid.*

[16] See The Minutes of the World War Foreign Debt Commission, 1922–1926, Washington, 1927.

statute have provided a possible judicial sanction for the present-day violation of international financial agreements.

*6. Loss of Territory and Property*

Of considerably less importance than the sanctions suggested up to this point is one discovered in but few treaties, and which calls for the loss or forfeiture of certain goods or territories as a penalty for contravention. This sanction differs from that of occupation or hypothecation of land, towns, or movable property in that here the property or territory is not actually in the possession of the stipulating party, or even hypothecated to it temporarily, but is kept clearly in the possession of the state from which performance is expected until a failure to perform occurs. Such was the case for example in a medieval treaty between Phillip, Count of Flanders, and Florens, Count of Holland, March, 1167, whereby it was agreed that if Florens should contravene the terms of the agreement, he was to forfeit all the land he held in fief from the Count of Flanders.[1] It is in fact in connection with the medieval treaties that this type of sanction is found almost entirely; it occurs again in a treaty between Phillip IV and Robert de Bethune of Flanders, June, 1305[2] according to which Robert was to forfeit the whole of Flanders if he violated the agreement. Such a sanction again presents the familiar difficulty: if the land is to be forfeited, how can the injured party be sure of receiving his due? If a party feels himself in a position to violate the treaty, it seems unlikely that he would willingly give up the territory called for; and if coercion is necessary to make the party forfeit as promised, the original sanction is of small value by itself; such stipulations as those just considered amount really to an authorization to an injured party to step in and seize territory if it is strong enough. Otherwise it can hardly expect to receive the territory freely given when the original terms of the convention itself have not been lived up to.

Sanction of this nature appears not to have survived the Middle Ages to any extent. A treaty between the United States and certain Indians in New York provided in Article 3[3] 11 June, 1838: "It is further agreed that such of the tribes of the New York Indians as do not remove (according to the treaty) to the country set apart for

[1] Dumont, I, 1, 87 "Lequel (Florens) contre venant a cette paix fourfera toute la terre qu'il tient en fief de la Conte de Flandre sans autre solennitete de ley et n'en jouira jusques a ce qu'il aurait le tout repare."

[2] *Ibid.*, 341.

[3] De Martens, *Nour. Rec.*, XVI, i, 92.

their new homes within 5 years . . . shall forfeit all interest in the lands so set apart, to the United States." Here the sanction contained considerable vigor; the two parties were not politically upon an equal footing, and the United States, being so much more powerful than the Indian tribes, would have been able to execute the sanction without difficulty. Only if one of the parties is able to carry out the sanction in a case like this where forfeiture of territory is involved—that is, provide a sanction for a sanction—is that sanction of any particular efficacy.

A variation of this sanction of forfeiture is provided by a few treaties where persons and movable property, rather than territory was involved. A Greek treaty of peace between the Acheans and Spartans, 188 B.C.[4] allowed the Acheans to seize and sell all slaves which had not left Sparta within a specified period of time. A convention relating to Article II of a treaty between England and Sweden, 15 July, 1656[5] stipulated that "so long as the said war continues (between England and Spain) the Swedes shall not carry to Spain pitch, tar, hemp, cables, sail cloth, or masts, and if any shall be carried contrary to the tenor thereof, the same shall be liable to be seized and forfeited." The threat of such seizure and forfeiture constituted a genuine sanction, but in the main treaties relating to contraband, to which the above convention is closely akin, do not fall under this category of treaty sanction inasmuch as they usually merely provided that if such and such kinds of goods were carried they might be seized as contraband, the carriage of such contraband not being strictly counter to the treaty.[6]

Because of the obvious difficulties of making the sanction effective, especially where territory was concerned, the threatened loss of land or goods through forfeiture did not constitute a particularly useful sanction, and it is not surprising that it has not achieved wider vogue. Only where one party was in a position actually to force the taking over of territory or to seize the goods, could the sanction have been of material effect. The situation with regard to contraband was a bit

[4] Barbeyrac, I, 367.

[5] Horsley, 92.

[6] For first treaty employing the word contraband (Gr. Br. and Holland, 7 September, 1625) see Davenport, *European Treaties Bearing on the History of the U. S. and Its Dependencies to 1648*, 1917, 290–299. For other early treaties on contraband: Art. XII and XIII, Peace of Pyrenees, 1659, Horsley, 101; Gr. Br. and France, 1713, Jenkinson, *Treaties*, II, 51; See also Cheyney, E. P. *History of England from Defeat of Armada to the Death of Elizabeth*, 1914, I, Chap. XXII; Nys, *Les Origines du Droit Int.*, 226–228; Grotius, *op. cit.*, III, I, v. 1–3; Moore, J. B. *Contraband of War*, 1912.

different and perhaps should not be included here at all; in the forfeiture cases first mentioned, definite territories were to be given over if the treaty were violated. With contraband, the treaty was only infringed if the goods, liable to forfeiture, were actually carried—they were not the forfeit in case some other section of the agreement were contravened. And, as the contraband treaties were developed, as has been suggested, no real treaty sanction came to be involved, so that the sanction of forfeiture most properly concerns only territory, and in that regard, it has been obsolete for nearly a century.

*7. Rewards for Treaty Observance*

One obvious motive for a signatory's abiding by the treaty's terms lies in the desire that the other party shall not feel itself relieved from its engagements; if a particular signatory believes that it derives benefits from the fact that the agreement is in force, the fear that that agreement might be abrogated by the other party or parties if it infringed upon the treaty terms, serves as a sanction for the agreement. The loss of the benefits of the treaty might be considerable, as subsequently argued[1] and the reward for non-violation would lie in the expectancy that the other contractants would likewise continue to maintain the treaty in force.[2] Such a reward for treaty observations always is likely to exist. Sometimes, however, in addition to this general benefit from treaty observation to all parties, specific rewards have been offered by one contractant as an extra inducement for faithful observation. Instead of threatening the loss of goods, privileges, lands, or persons, extra and special benefits have occasionally been offered. Such special benefits would be remunatory rather than vindicatory sanctions,[3] and have been employed but rarely in treaties, apparently. Where they have been used has been in treaties between a large power and an "inferior" or "backward" people who seemed to require additional or exceptional gifts or favors to induce performance and conformity. One such treaty was that between Great Britain and the Cherokee Indians, 20 Sept., 1730,[4] Art. VIII of which specified that if the Indians lived up to their obligations in regard to roads, commerce, and assistance in time of need, the British were to reward them with 20 rifles, 200 lbs. of powder, 500 lbs. of balls for

[1] See page 162.

[2] Blackstone, *op. cit.*, 55; "Quiet enjoyment and protection of our rights and liberties are the most valuable of all rewards."

[3] Blackstone, *ibid.*

[4] Dumont, VIII, 2, 162.

muskets, and 500 lbs. for cannon. Similarly, Art. X of the United States treaty with the Navajos, 9 Sept. 1849,[5] read: ". . . in consideration of the faithful performance of the stipulation herein contained by the Navajo Indians, the governemnt of the United States will grant to said Indians such donations, presents, and implements, and adopt such other liberal measures as said government may deem meet and proper." The same "sanction for sanctions" problem exists here as with the vindicatory sanctions; how is the United States to be made to apply the sanction—that is, the giving of gifts—if it should not "deem it meet and proper?" There is assuredly nothing automatic about such a sanction,[6] and it deserves little more than passing attention because of the rarity of the instances in which it has been used.

Consideration of this "reward" sanction brings to a conclusion the discussion of the sanctions which are either obsolete or of minor importance at the present time. For those interested in the enforcement of modern conventions, however, the choice of sanctions lies among five main types.

## II. SANCTIONS OF CURRENT AND PRESENT IMPORTANCE

### *8. Third Party Guarantee of a Treaty*[1]

A form of treaty sanction of historic origin and which is still very much in use today is that of guarantee by third party or parties. The sanction consists in the possible intervention by outside rulers or states who are authorized to coerce a violator party, the authorization being made either in the original treaty itself or in a separate supplementary convention. Furthermore, the guarantee may be collective, that is, by several states, or it may be individual. The guarantor, single or plural, assumes the responsibility for the execution and observance

[5] De Martens, Cussy, v, 347.

[6] Some question may be raised as to how such provisions as those cited here differ from clauses in many treaties calling for the payment in money or otherwise for territory, goods, or property ceded or leased. Is not this just another instance of payment for services or benefits received? There is a difference, however; many treaties call for payments to be made for definite goods or services but not for the mere observance of the treaty. It is an exchange of money for specific items received. In these Indian treaties, however, payment is made for observance or performance of the terms. It is an exchange of money or gifts in return for treaty observance, not for goods or services under the treaty.

[1] For general discussion see Vattel Bk., II, XVI, 236–240; Phillimore *Commentaries upon Int. Law*, Chap. VII; Phillipson, 209 *et seq.;* Nys, *Le Droit Int.*, 39 *et seq.;* Fiore *Le Droit Int. Cod.*, 785–786; Rivier, *op. cit.*, 97–106.

of the treaty and is bound to intervene, where the guarantee is made in the original treaty, according to Vattel only at the express request of one of the parties to the agreement,[2] though Bluntschli states that interposition may occur whenever the situation obviously demands it.[3] Where the guarantee is made the object of a special additional convention, the guarantors may take the initiative whenever they conceive their interests to be injured, without waiting for a summons from one of the signatories of the guaranteed convention.[4] They are to act in concert if they can; if collaboration is impossible each is at liberty to act for himself as his interests dictate.

The guarantor usually is responsible for the treaty as a whole, unless the guarantee is made with regard to specific articles, and cannot draw a distinction between essential and non-essential portions but is considered released from his obligations where the treaty is counter to the rights given to a third party by a former treaty if that party objects or where, according to Bluntschli,[5] a treaty tends to block the development of a state and its constitutional law (rebus sic stantibus). In theory, thus, the exact legal position, rights and duties of the guarantor have never been too clearly established and in practise, too, guarantor states have exercised wide discretion in the carrying into effect of their responsibilities, a famous example being the French declaration for the Elector of Bavaria against the heiress of Charles VI,[6] though France had most explicitly guaranteed the Pragmatic Sanction of that Emperor.[7] Since the World War, however, the League of Nations and new ideas as to "security" have introduced somewhat different factors from those considered by Vattel, Bluntschli and the older writers, and they must be considered after a glance at past usage.

(a) Individual guarantee included in the original treaty

In the year 557 B.C. the Armenians and Chaldeans made a treaty in the text of which appeared the following provision: ". . . and Cyrus (of Persia) agrees to act as guarantor of its observance, declaring that he will take the side of the party to the prejudice of whom the treaty has been infringed in any manner whatsoever."[8] Such a provision

[2] Bk. II, XVI, par. 236.
[3] *Droit Int.*, Cod., 431.
[4] *Ibid.*
[5] *Ibid.*, 437.
[6] Vattel, Bk. II, XVI, 238.
[7] Treaty of 18 November, 1738 between France and Austria, De Koch, II, 251–256.
[8] Barbeyrac, I, 55.

appears to have been rare in ancient conventions for nothing similar has been found until medieval days when the use of the guarantee became fairly general. Louis X of France was made a party to the treaty between the Countess of Artois and some neighboring nobles (Dec. 1315) and stated "por plus fermement les choses dessudites . . . nous avons ordene que . . . nous de notre pouvoir contraindrons ladicte Comtesse (and nobles) a tenir et gerder toutes les choses dessusdites."[9] In a treaty of 1330 between John of Bohemia and Edward, Count of Bar, the King of France again was guarantor, agreeing to help either party injured by a violation and forbidding his subjects to aid in any way a party not conforming to the terms.[10] Similar instances are found in several treaties of the ensuing centuries,[11] but the guarantee sometimes was designed to operate only for the benefit of one party, instead of for both as in the examples above. In the agreement between Gustavus Adolphus of Sweden and the Catholic States of Germany (29 Jan. 1632), Article XV reads, "pour plus grande asseurance, le Roi . . . de France promettra que . . . les Princes Catholiques . . . observeront fidellement cette neutralite en tous ces points et que s'ils y contreviennent il se joindra avec la Majeste Royale de Suede. . . . "[12]

In the 18th century, for both the collective and the individual guarantee, a more or less standard article came to be inserted in many of the conventions, art. XXVIII of a treaty between Austria and the Netherlands (8 Nov. 1785)[13] for example stating that "His Majesty (King of France) is requested by the High Contracting Parties to assume the guarantee of the present treaty." In conventions of this type, the guarantor had not already committed himself as in the previous citations, was not a party to the agreement, and was merely "requested" to act in a guarantor capacity. The treaties of that epoch abound in examples of this kind.

The British in India and the Near East employed the device of the guarantee upon several occasions in their efforts toward pacification. In a treaty between two Indian potentates, Nabob of the Carnatic and the Rajah of Tanjore (13 Oct. 1762), an official of the British East India Co., George Pigot, in art. V promised "that in case either

[9] Dumont, I, 2, 28.

[10] Dumont, I, 2, 124.

[11] *Ibid.*, III, 2, 262 (treaty between Emp. Max. and City of Bruges, 6 December, 1490) and V, 2, 153, (Duchy and County of Burgundy, 12 December, 1610).

[12] *Ibid.*, VI, 1, 29.

[13] De Martens, II.

party shall (violate the agreement) we will . . . assist the other party to compel him who shall fail to fulfill his agreement . . . to render due satisfaction for his failure therein."[14] A like instance is a treaty between the East India Company and Poshwah Madhoo Row of the Marattah Nation in which the Maha Rajah Subadat was the designated guarantor,[15] and in a peace treaty among the Arab chiefs on the Persian Gulf, article IV stated, "We further agree that the maintenance of the peace now concluded amongst us shall be watched over by the British government who will take steps to insure at all times the due observance of the above articles."[16]

A use of the guarantee in South America is discovered in the peace treaty of 8 Nov. 1831 between Peru and Bolivia, art. XX of which provided, "If any one or more of the articles contained in this treaty be infringed by either of the contracting parties, they shall apply to the power that guarantees them to declare which of them has received the injury, which, in conjunction with the injured party, shall exact from the other due satisfaction and indemnification."[17] Guatemala, in 1898, undertook the guarantee of a peace treaty between Costa Rica and the "Greater Republic of Central Anerica."[18]

(b) Individual guarantee by separate treaty.

Sometimes by a separate treaty a state has agreed to guarantee or enforce a convention between two other parties. This has been accomplished usually in the form of a treaty with one of the original contracting parties which desired extra support in the enforcement of its terms, occasionally by convention with both of the original parties as was the case in 1718[19] when George I of Great Britain, by treaty with Charles VI and the Netherlands confirmed and guaranteed parts of the Barrier Treaty of 1713.[20] Where the treaty of guarantee was made between the guarantor and only one of the first contracting parties,an alliance was virtually established for the maintenance of the status quo. Such was the case with the treaty between Great Britain and Prussia (29 Nov., 1742) by articles 2 and 3 of which[21] the former

[14] *Ibid.*

[15] De Martens, *Rec.*, Vol. II.

[16] *Ibid.*, *Nouv. Rec.*, XVI, 2, 123 ;Russia also was guarantor of a picturesque treaty between Persia and Afghanistan, July, 1838. *Ibid.*, XV, 642.

[17] *Ibid.*, X, 421.

[18] *Ibid.*, *Nouv. Rec. Gén.*, 2 me série, xxxii, 84.

[19] Dumont, VIII, 1, 551.

[20] Great Britain and the Netherlands. Utrecht, January 29, Art. XIV, Horsley, 366

[21] De Koch, 340.

guaranteed the treaty of Berlin[22] made between Frederick II of Prussia and Maria Theresa of Austria in July of that same year. The English promised special aid in men and money in case of attack or infringement by Austria. A similar sort of unilateral arrangement would have been set up by the unratified treaty of 28 June, 1919 between the United States and France, article 1 of which declared, "In case the following stipulations relating to the Left Bank of the Rhine contained in the Treaty of Peace—articles 42, 43, 44—may not at first provide adequate security and protection to France, the United States of America shall be bound to come immediately to her assistance in the event of any unprovoked movement of agression against her being made by Germany."[23] This type of guarantee by separate agreement with one of the parties to the initial convention is apt to be largely political in nature; the measures of force applied under it operate in behalf of only one side.[24] Law is impartial, and a guarantee, where it favors only one party, cannot be sufficiently unbiased to make it a true legal sanction.

One of the weaknesses of "self-help" as a sanction pointed out previously is that each party determines for itself when it has received an injury. A merit of the guarantee is that it tends to shift the burden of decision and enforcement to a supposedly neutral party who stands apart in somewhat the same capacity as a judge. This judicial element is likely to be absent where the guarantee is not made in the interests of both or all parties.

(c) Collective guarantee included in the original treaty.

A formula, similar to the one already mentioned in the foregoing section, was much in favor in the 17th and 18th centuries and consisted in an invitation to outside states and princes to become guarantors of the pact. These invitees were not necessarily active participants in the signing of the original treaty and the guarantee was not very definite or precise. Such was the case with the treaty of peace between Spain and France signed at Nimeguen (17 Sept., 1678) in which article XXX simply said, "All princes that please may be guarantees of this treaty."[25] A treaty between the same two parties

[22] *Ibid.*, 320.

[23] De Martens, *Nouv. Rec. Gén.*, 3 me série, XVI, 3.

[24] Great Britain, however, made special agreements with both France and Prussia in 1870 by which the British would join in the conflict on the side opposing the party which might violate the Belgian neutrality treaty of 1839. De Martens, *Nouv. Rec. Gén.*, 2 me série XIX, 590–593.

[25] Horsley, 191.

signed at Reswick, (20 Sept., 1697) was somewhat more explicit in that it stated that "the King of Sweden and any other princes and states may be guarantees of this treaty,"[26] but this permissive clause did not definitely provide for the setting up of a guarantor; the third parties were not committed by the agreement. Often the gurantee provisions dwindled to mere promises to try to obtain the consent of other parties to act as guarantors, a treaty between Poland and Austria (18 Sept., 1773) for example stating in article XIV " . . . the two High Contracting Parties will try . . . to obtain the guarantee of Russia and Prussia in order to provide for the more effective and exact observation of this treaty."[27]

In these older forms of the guarantee the attempt was being made to lift the question of treaty enforcement and violation from the insecure, individual "self-help" basis to a higher level of non-partizanship and judicial determination. The lack of a common judge was felt, but with no central international agency in existence, statesmen and rulers fumbled around with the expedients available and so called upon third states to act as guarantors. These latter by law were deemed to possess certain rights and duties, but there was no guarantee that the guarantor would act in a legal fashion; the responsibility had merely shifted to another state or set of states who might act in a legal fashion or not as they felt disposed. How to coerce the guarantor? The sanction for sanctions problem was ever present. "The most important means for securing the enforcement of the law and the means which are generally effective lie in the fact that the personal interests of the officials coincide with the performance of their duties."[28] The "officials," in the older form of guarantee, were individual princes or states who at times found it not to their "personal" interest to apply the penalties called for in case of violation, namely, intervention to enforce terms against the infringing party, and the law frequently went unenforced. A collective agency to feel responsible for community good behavior and law obedience did not exist; only at irregular intervals did the states act together to demonstrate that their "personal interests" coincided with the performance of their obligations.

The establishment of the League of Nations afforded an opportunity for a new use of the guarantee; the form was different but the

[26] *Ibid.*, 255.
[27] De Martens, *Rec.*, Vol. I.
[28] Krabbe, *op. cit.*, 118.

principle was the same, namely, the responsibility of an outside agency for the performance of treaty terms. The treaties of the post-war period gave manifold evidence of the wide use of the League as "guarantor"—not guarantor in the sense of being an active party to the pact and formally agreeing to enforce its terms, but nevertheless as an agency authorized to intervene and to take action in the event of violation. The members of the League, that is most of the states of the world, acting through the League organization take the place of the individual rulers and states who guaranteed the agreements of former centuries. As stated previously, treaty observance is regarded as vital to the highly complicated, tightly knit world of today, and states acting collectively are finding that their "personal" interests coincide with the duty of enforcing the law and treaties. The strong feeling that interstate agreements must be kept if world society is to endure is the inducement for states, operating via the League, to apply the penalties which monarchs and nations might not have felt inclined to invoke when the need for treaty observance was not considered so urgent for the welfare of all concerned. The League has come in large part to take the place of the collective guarantees, both those contained in the original treaty and those in separate conventions.

In regard to minorities after the war, the League was the authorized agency for the determination of infraction and of the steps necessary to secure enforcement. Article 69 of the Treaty of St. Germain states, "Austria agrees that every member of the League of Nations shall have the right to call the attention of the Council to any infraction or danger of infraction of any one of these obligations and that the Council shall proceed in such a way and shall give such instructions as may seem appropriate and efficacious under the . . . circumstances."[29] Similar provisions are found in the Treaty of Sèvres,[30] in the British, French, Italian and Japanese agreement with Armenia,[31] in the Treaty of Lausanne, 1923,[32] in the treaty for the cession of Memel to Lithuania,[33] and in the various "minority" conventions.[34] In a report to the Council in 1920, M. Tittoni of Italy stated, "Up to the present time international law has entrusted to the Great Powers

[29] De Martens, *Nouv. Rec. Gén.*, 3 me série, XI, 691.
[30] Art. 143, *Ibid.*, XII, 664.
[31] Art. 8, *Ibid.*, 795.
[32] Art. 44, *Ibid.*, XIII, 342.
[33] Art. 17, *Ibid.*, XV, 106.
[34] Allies and Poland, Czecho-Slovakia, Jugo-Slavia, Roumania, *Ibid.*, XIII, 504 512 *et seq.*

the guarantee for the execution of (minorities treaties). The treaties of Peace have introduced a new system. They have appealed to the League of Nations . . . The Council must take action in the event of any infraction or danger of infraction of any of the obligations with regard to the minorities in question."[35] These guarantor functions of the League were dramatically put to a test in the spring of 1933 in the case of Franz Bernheim, a German national, who petitioned the Council to the effect that German anti-Semitic legislation was in conflict with Germany's obligations under the Convention of May 15, 1922 between Germany and Poland concerning Upper Silesia. The report to the Council by Mr. Sean Lester of the Irish Free State who investigated the matter supported the contention of the petitioner and recommended that the matter be referred to a committee of jurists, a procedure which the council adopted.[36] Meanwhile, Germany, which had agreed in the Convention of 1922[37] that the obligations of the agreement should be placed under the guarantee of the League, implied in a declaration to the Council that she would annul the legislation alleged to violate the treaty terms.[38] The situation was tense, for this was the first occasion upon which Hitlerite anti-Semitism had provoked official comment by members of the Council, and the entire world was anxiously watching the proceedings. The effectiveness of the League as a guarantor seems to lie in an instance such as this, in the mobilization of public opinion and in the threat of possible future measures by the powers who are members of the Council, rather than in any threat of direct and immediate action. The Bernheim episode is an interesting and almost unique example of an international agency, by treaty authorization, affording a citizen greater protection and rights than many of his fellow nationals enjoy in non-treaty protected parts of the nation.

The treaty concerning the navigation of the Elbe signed by the Great Powers and Czechoslovakia (22 Feb., 1922)[39] provided in article 52 that all questions of violation should be left to the League of Nations, and in the treaty between ten states guaranteeing the neutralization and non-fortification of the Aaland Islands, article 7 declares that "in order to make efficacious the guarantee forseen in the preamble . . . the High Contracting Parites . . . will apply to the

[35] *Off. Jour.*, Nov.–Dec. 1920, p. 8.
[36] *New York Times*, 30 May, 1933.
[37] Article 72.
[38] *New York Times, supra.*
[39] De Martens, *Nouv. Rec. Gén.*, 3 me série, XII, 632.

Council of the League of Nations in order that it may decide upon the measures to be taken, whether to maintain the provisions of the present convention or to secure amends for any violation thereof."[40] Here the parties to the agreement made the League very much of a real guarantor; it was authorized to intervene in the event of violation and to take appropriate measures for enforcement. The collective force of all the members of the League was impliedly behind the "guarantee." The sanction is the same as in the standard "old-fashioned" guarantee: a violator state faces the interposition of an outside, third-party agency which decides when and where infringement has occured and which is authorized to use the means it judges most useful for the preservation of the treaty provisions. The parties to many of these post-war conventions are themselves members of the League and in one sense might be said to be their own guarantors. To the extent that the parties to a treaty "guaranteed" by the League are controlling forces in the League, the guarantee becomes that much less of an impartial, third-party affair and more of a partisan, individual matter.

The demands for "security," chiefly by France and her allies, for the maintenance of the status quo established in the treaties of peace, have led to use of the League in the "Locarno-guarantee" type of treaty. In the abortive Geneva protocol of 1924[41] the attempt was made to harness the sanctions of article 16 of the Covenant to the machinery for the penalizing of a violator of the terms of the agreement, and in the treaty signed at Locarno (16 Oct., 1925)[42] it was provided in article 4 that if one of the High Contracting parties considered that a violation of article 1 (also article 42 and 43 of the Treaty of Versailles) had occurred the Council of the League should be apprised thereof immediately, the Council to recommend to the signatories whatever action the situation seemed to require. In the case of flagrant violation, however, (art. 4, par. 3) the older type of guarantee, namely that by individual, specifically mentioned powers, was revived, Great Britain and Italy pledging themselves to aid immediately either party attacked without waiting for a Council decision. Germany, Belgium or France, should one of them violate the provisions with regard to article 2, face a penalty in the form of war, not only with the neighbor whose territory has been invaded but with the

[40] *Ibid.*, 65.
[41] See D. H. Miller, *The Geneva Protocol.*
[42] De Martens, *Nouv. Rec. Gén.*, 3 me Série, XVI, 7.

guarantor states, Italy and Great Britain. As formerly, if the guarantor states feel it to their interest to see that the treaty is observed, the sanction would be an exceedingly effective one.

References also to the Court to be set up by the League as an agency for determining when a breach has occured were numerous in the peace treaties bringing to a close the World War. Article 386 of the Treaty of Versailles reads, "In the event of violation of any of the conditions of articles 380–386 or of disputes, any interested power can appeal to the jurisdiction instituted for that purpose by the League of Nations."[43] Article 297 of the Treaty of Saint Germain, relating to the Danube, provided that "if a state neglects to conform to these obligations, each state . . . represented on the international commission may appeal to the jurisdiction instituted for that purpose by the League of Nations,"[44] and article 57 of the Treaty of Neuilly provided that disputes regarding the minority sections should go to the World Court.[45] The Court, of course, is in a different position from that of the guarantor spoken of by Vattel, for example; it is not a party to any specific agreement and it has no force to carry out its decisions. Its position is a passive one but it does carry on the guarantor tradition of deciding which party is in the wrong where there is infringement, and once asked to intervene, its intervention is enforced by means of public opinion plus whatever subsidiary action the members of the League and the other signatories of the pact may feel called upon to undertake.[46] At least there is judicial examination of the merits of the case in dispute.

(d) Collective guarantee by separate treaty.

A measure frequently employed since the 18th century has been that of a special convention, usually between two or more of the Great Powers, guaranteeing the maintenance of a treaty whose observance seemed essential for the interests of those guaranteeing states. France and Russia in an act of guarantee signed at Teschen (13 May, 1779)[47] guaranteed the treaty of peace signed between Prussia and Austria at the same spot on the same day; article 1 of the alliance between Great Britain, Austria, Russia and Prussia (20 Nov., 1815) declared, "The High Contracting Parties mutually prom-

[43] De Martens, 3 me Série, XI, 323.
[44] *Ibid.*, 691; also Art. 281 of the Treaty of Trianon, *ibid.*, XII, 423.
[45] *Ibid.*, 324.
[46] See discussion of judicial sanction, p. 72.
[47] De Martens, *Rec.*, Vol. I.

ise to maintain vigorously in force the treaty signed today with (the King of France) and to see that the stipulations of this treaty . . . are strictly and faithfully executed."[48] This was a unilateral affair in operation as the signatories to this convention were also parties to the treaty with France; the guarantee worked only in one direction. On the same date the act guaranteeing Swiss neutrality was also signed. "The powers which have signed the declaration of Vienna (20 March, 1815) recognize in a formal manner . . . by this present act the perpetual neutrality of Switzerland and guarantee the inviolability of its territory."[49] The Netherlands-Belgium treaty (19 April, 1839)[50] by article 7 stipulated that Belgium should forever constitute a neutral state and this whole treaty was placed under the guarantee of the Great Powers in a Treaty[51] of the same date between France, Austria, Great Britain, Prussia and Russia, article 1 of which stated that the articles of the Belgian-Dutch agreement "are considered as having the same force and efficacy as if they were textually inserted in the present act and are thus placed under the guarantee of their respective Majesties." The treaty bringing to a close the Crimean War (30 March, 1856)[52] was guaranteed by Austria, France and Great Britain by special convention (15 April, 1856) which read, "Art. I. The High Contracting Parties guarantee firmly among themselves the independence of the Ottoman Empire as fixed in the treaty concluded at Paris, 30 March, 1856; Art. II. Any infraction of the stipulations of the said treaty shall be considered by the parties signatory to the present treaty as casus belli."[53] The sanction for violation here was most explicitly stated. The neutralization of Luxembourg treaty (11 May, 1867)[54] and that respecting the integrity of Norway (2 Nov., 1907)[55] are not germane to the present discussion in as much as they were not guarantees of a situation previously set up by a treaty.

As was the case with the collective guarantee mentioned in original treaties, the League of Nations has introduced a new element in guarantees by separate convention, and it is interesting to compare two treaties respecting the Dardanelles and the Bosphorus, one

[48] *Ibid.*, *Nouv. Rec.*, II, 734.
[49] *Ibid.*, 740.
[50] *Ibid.*, XVI, 2, 773.
[51] *Ibid.*, 788.
[52] De Martens, Cussy, VII, 497.
[53] *Ibid.*, 511.
[54] De Martens, *Nouv. Rec. Gén.*, XVIII.
[55] *Ibid.*, 3 me Série, I, 14.

signed in 1881, the other in 1923. The first was ancillary to the treaty of Berlin of 1878 and was signed by Austria-Hungary, Germany and Russia who recognized the "principle of the closing of the Straits as founded upon the Law of Nations and upon treaties" and who "in the event of infraction . . . shall warn Turkey that they would consider such a situation as placing Turkey in a state of war with the injured party and of depriving it of the benefits of security and the status quo assured by the treaty of Berlin."[56] The three powers by themselves could invoke the penalty and force the Turks to abide by the treaty terms. The Straits convention signed at Lausanne (24 July, 1923),[57] however, declared that whenever there occured a violation of the treaty provisions providing for the freedom of navigation of the Straits, it was for the Council of the League of Nations to determine what measures should be applied. The guarantors now act through the medium of the League of Nations, which, strictly speaking, does not itself assume the status of guarantor, but receives it from the actual signatories to the treaty. In the history of guarantee treaties, the guarantor has often been a passive designatee in the original convention but where the guarantee has been made by outside powers in a separate document, these powers have usually taken the initiative, until the appearance of the League, which as the present collective guarantee agency, does not take an active part in the original guarantee provisions.

Extra guarantees of the terms of the peace treaties have been made by France in her conventions with some of the states of Middle Europe, article 1 of the Franco-Czechoslovak convention (25 Jan. 1924)[58] reading, "The governments . . . mutually agree to act in concert on questions of foreign affairs which menace their security and threaten the order established by the Treaties of Peace." Similar terms are found in the treaty between France and Jugo-Slavia of 11 November 1927,[59] and in the agreement between France and Czechoslovakia and France and Poland signed at Locarno (16 Oct., 1925)[60] the parties promise mutual aid and assistance if Germany fails to live up to her treaty obligations. Articles 42 and 43 of the Treaty of Versailles are also supported and guaranteed by the general Locarno treaty between France, Germany, Belgium, Great Britain and Italy. The situation

[56] *Ibid.*, x, 9.
[57] De Martens, 3 me Série, xiii, 391.
[58] *Ibid.*, 470.
[59] *Ibid.*, xviii, 347.
[60] *Ibid.*, 655.

established by the peace treaties of 1919–1920 is thus heavily guaranteed in one form or another—Locarno, treaties of alliance, treaties authorizing intervention by the League of Nations in case of infraction, etc. The conventions between France and her satellites merely represent a modern use of an old device, namely that of supporting favorably regarded treaties by supplementary ones calling for joint aid and collaboration if and when the first treaty is infringed upon.

Treaties of guarantee where an outside party or parties assume or are asked to assume the duties of seeing that the provisions of a given treaty are carried out have long existed in four forms: individual and collective; by inclusion in the original treaty and by separate convention. The treaty sanction lies in the intervention authorized by the treaty itself or by the secondary and supplementary one for that special purpose. The sanction is by no means an automatic one for it depends upon the desires and wishes of the guarantors for its efficacy. With the setting up of the League of Nations, guarantee treaties have entered upon a new phase. That new organization has been given the task of taking action where violation has occurred in many treaties since the war. It does not operate after the manner of the old guarantors who had their own forces directly at their disposal, for the League system of coercion in article 16 has never been tried out. Nevertheless, the League possesses the right to intervene and make recommendations after the fashion of the old collective guarantee system—a state violating a treaty which authorizes League interposition faces a penalty in the form of investigation by an outside agency, perhaps world-wide unfavorable publicity which the investigation may bring about and as a last resort possibly even the application of the League's own sanctions. If not that, then perhaps it faces recommendations and authorizations to the non-violator parties to use their forces against the transgressor, e.g. Aaland Islands treaty. The league "guarantee," because it represents more nations of the world, may be more effective than the older type of guarantee by the Great Powers alone, even though these latter could more easily and directly apply measures of force.

9. *Mutual Agreement to aid in "Punishing" or resisting the Violator or to Collaborate When Violation Occurs*

Instead of seeking or obtaining the guarantee of outside parties to the terms of a convention, princes and states in making treaties have frequently guaranteed the treaty as between themselves and, in

multi-party agreements, have at times agreet to joint action against the violator. Some of these treaties have contained only a reciprocal guarantee with no definite provisions as to the consequences of infringement, but common cause against the malefactor even in such an instance is usually implied. An early example of this type of sanction is found in a treaty between Louis XI and the Dukes of Normandy, Brittany, Calabria, Lorraine and others (29 Oct., 1465) in which it was stated "that if any of the said Dukes acts or desires to act . . . against the King and to the prejudice of this treaty . . . in such a case the others shall be obliged to serve and aid the King . . . And also if the King acts or seeks to act in a manner contrary to the treaty. . . the said Dukes shall aid and assist one another."[1] A more famous instance of an agreement to operate jointly against a violator occurred in the treaty between the Empire and France signed at Munster, 24 October 1648. Article 70 of this document stated that "all persons concerned in this treaty shall be obliged to maintain every part of it against any of whatever religion so ever. And if any encroachment be made, the party aggrieved shall endeavor to obtain right in a friendly or legal manner which if not to be obtained in three years, then all those concerned in this treaty shall join the party that is wronged for the obtaining of a just satisfaction."[2] This amounts to the authorization of a joint use of force against an "aggressor" as the violator might be termed, and may be compared with Article 16 of the League of Nations Covenant. The Covenant of course is not a peace treaty, though it is Part I of the Treaty of Versailles, and the disputes for the settlement of which it provides and specifies the machinery, articles 12–15, do not refer to those concerning the stipulations and provisions of the Covenant itself, yet it is interesting to observe that in both, an amicable method of settlement is provided for, after which joint action is to be resorted to if necessary to preserve the terms of the agreement. The outstanding difference is that the Munster treaty provides no agency analogous to the Council to help determine when violation has occured and to coordinate the application of sanctions. The weakness of both lies in the fact that the signatory, pledging parties may fail to carry through as promised when it comes to the actual employment of force. Again as with guarantors and conservators, the sanction is very far from being automatic. Treaties may be heavily implemented on paper by pledges

[1] Dumont, III, 337.
[2] Horsley, 18.

of the use of force, but the actual employment of it is only promised, and the will of the individual promissor is what decides in the last analysis. Must the promissor be coerced into coercing the first promise-breaker?

In the so-called Union of Frankfort (22 May, 1744)[3] between the Emperor, the King of Prussia, the Elector of the Palatinate and the King of Sweden, article 4 contained reciprocal guarantees of each other's possessions and further stipulated mutual aid with all their forces against any signatory power violating the agreement. But many treaties contain the reciprocal guarantees without any further provision for coercive action, and this type is common, an example being the peace treaty of Paris (10 Feb., 1763) in article 26 of which the three parties, Great Britain, France and Spain "guarantee generally and reciprocally all the stipulations of the present treaty."[4] Such a provision is vague: does it mean that all parties will act together as against possible outside interference? Does it mean that two will join against any one violator as among the signatories themselves? Perhaps both. It amounts to nothing more, really, than the simple promise of observance discussed in section one. Whatever sanction there may be is only implied and that not much more than in any treaty for the backing of which it is always understood a state may invoke the general sanctions of international law already discussed.

Central and South American countries have upon occasion used a formula somewhat similar to that used in the Munster agreement. An alliance between several Latin American nations in 1865[5] declared that "if . . . one of the contracting parties fails to observe the conditions of this general union, all of the others will consider that party as disloyal and will take action against it," and the treaty setting up the Central American Union in 1872[6] stated in article 3 that "the government or the governments which infringe upon this principle (arbitrations of all disputes) commit an act of treason against the Central American 'nation' . . . and every infraction of this pact shall be submitted to the collective arbitral judgment of the governments . . . which oblige themselves to respect that judgment and to see that it is respected." In such cases the sanction—namely the joint action against the perpetrator of a violation—is very positively stated.

[3] de Koch, 346.

[4] De Martens, *Recueil*, I; see also Peace of Amiens, (27 March, 1802, *ibid.*, VII, 404.)

[5] Salvador, Bolivia, Colombia, Chile, Ecuador, Peru, and Venezuela. (10 July, 1865). De Martens, *Nouv. Rec. Gén.*, XX, 596.

[6] *Ibid.*, 2 me Série, III, 476.

What would be the sanction if they all should violate? That there would be none, just as when the machinery of enforcement breaks down at times inside the state in periods of general revolt and upheaval, seems evident.

Instead of providing definitely for common action toward a violator or merely announcing a reciprocal guarantee, many treaties have called for the summoning of a joint conference or exchange of views when a breach in the treaty terms has occurred. Definite steps of some sort are thus provided for and yet the signatory parties have not expressly pledged themselves to take action against the treaty breaker. This provision for mutual collaboration therefore occupies a middle position between the two other modes just mentioned. Such, for example, was article 7 of the treaty signed at Paris (30 March, 1856) between the powers which had engaged in the Crimean War. This article provided that "Their Majesties, each on his own behalf, pledge themselves to respect the territorial integrity of the Ottoman Empire, guarantee in common the strict observance of this arrangement, and in consequence will consider any act which would menace the situation as a question of the general interest."[7] Action on the part of the Concert of Europe in the case of violation was thus duly authorized by treaty. Likewise article 8 of the treaty between the powers of Europe and Egypt (29 Oct., 1888), guaranteeing the freedom of the Suez Canal, stated that " . . . In any situation which might menace the security or the free passage of the canal (the representatives in Egypt of the signatory powers) shall assemble at the call of three of their number, . . . They shall inform the Khedive of the danger . . . in order that he may take the necessary measures to assure the protection and the free passage of the canal."[8] Also, the treaty guaranteeing the integrity of Norway (2 Nov., 1907) provided in article 2 that "if the integrity is . . . infringed upon by any power whatsoever, the (signatory) powers pledge themselves, having first received notice from the Norwegian government, by the means which seem to them the most appropriate, to lend their support to that government in order to safeguard the integrity of Norway."[9]

The question arises, however, as to whether the citations just made are examples of treaty sanctions. The latter should operate against a party which is signatory to a treaty and which later fails to live up

[7] De Martens, Cussy, VII, 497.
[8] De Martens, 2 me Série, XIV, 557.
[9] De Martens, 3 me Série, I, 14.

to its assumed obligations. Where a treaty sets up a political situation which a non-signatory party may refuse to observe, action taken against that party could not be classed as a treaty sanction. In regard to the examples offered from the treaties pertaining to Turkey, the Suez and Norway, it is not clear whether the action to be taken in the event of violation is to be against only an outside state or whether it includes joint action among the signatories as against one of their own number who may be delinquent. The wording, however,—"any act," "any power whatsoever"—is very inclusive and may be assumed to include violation by signatories as well as by third states. Such being the case these examples may properly be classed as treaty sanctions: a signatory power faces the definitely provided for joint collaboration of all the other parties concerned.

In a treaty such as that between Japan and Russia relating to Manchuria (4 July, 1910) where article 3 states, "In case any event arises of a nature to menace the status quo above mentioned, the two High Contracting Powers, shall in each case, enter into communication with each other in order to arrive at an understanding as to the measures they may judge it necessary to take for the maintenance of the said status quo,"[10] the action to be taken obviously relates to outside parties and cannot be considered as a threat for the application of a treaty sanction, and such would seem to be the case with most "status quo" treaties; it is the activity of third states that the signatories are concerned with, not so much each other's possible moves.

The Four Power Pacific Pact (13 Dec., 1921) made a very clear distinction between measures to be taken as among contractants on the one hand, and toward non-contractants on the other. Article I, paragraph 2, provided that if controversy developed between signatories, the other contracting parties were to be invited to a joint conference, while Article 2 stated that "If the said rights are threatened by the aggressive action of any other power, the High Contracting Parties shall communicate with one another fully and frankly in order to arrive at an understanding as to the most efficacious measures to be taken jointly or separately to meet the exigencies of the particular situation."[11] The true treaty sanction is found in connection with Article 1; direct application of a penalty is not specified but by implication it is only one step away. A contractant infringing upon the terms of the agreement at least must be prepared to face a joint conference

[10] De Martens, 3 me Série, III, 753.
[11] *Ibid.*, XII, 832.

between the other contractants, and very probably a large amount of unfavorable (to itself) publicity. Furthermore, though not directly mentioned, joint use of force is in the offing. The potentialities of collaboration, where violation has occurred, as a strong sanction were well realized by the French at the London Naval Conference of 1930 when so much discussion took place concerning the linking of the Pact of Paris to the League system of sanctions; it was felt by France that if only the powerful United States would commit itself to talk things over with the other states when a breach occurred, then the pact would have acquired some teeth.[12] The idea was that if the United States were drawn into conference it would be practically bound to join in a pronouncement against a violator and even if it would not cooperate actively in forceful means of coercion it at least would not adhere to its time-honored position of neutrality and would not allow any assistance to go to the violator party. By such a promise to collaborate it was hoped that a long train of sanctions—unfavorable public opinion, rupture of diplomatic relations, embargoes on capital, arms and goods, possibly even the use of military measures—would emanate in case of need from the relatively simple and plain promise to make common parley.[13] The Burton resolution,[14] unacted upon by the American Congress, would merely have substituted the President for the international conference as the agency for determining when a violation has occurred and would empower him to issue an embargo on funds and material destined for the violator country.

The question as to whether the United States will agree to consult if treaty violation is impending, or has occurred, is exceedingly important from the point of view of the organisation of international peace machinery. If the United States pledges consultation, it there-

[12] *American Foreign Relations*, 1931. Pp. 356–364.

[13] *New York Times*, 20 February, 1930.

[14] For text see Shotwell, *War as an Instrument of National Policy*, 1929, 101. The resolution in part declares "Resolved . . . that it is hereby declared to be the policy of the United States to prohibit the exportation of arms, munitions or implements of war to any country which engages in aggressive warfare against any other country in violation of any treaty, convention or other agreement to resort to arbitration or other peaceful means for the settlement of international controversies" and the resolution goes on to authorize the President by proclamation to put the policy into effect when the occasion arises. The task of determining the "aggressor" would thus devolve upon the President. The Capper resolution, see *ibid.*, 94–95, which was published by Senator Capper of Kansas, 21 November, 1927, called for embodiment in treaty form the principle "that the nationals of the contracting governments should not be protected by their governments in giving aid and comfort to an aggressor nation." The Burton resolution was intended merely as a unilateral proposal on the part of the United States.

by officially admits some responsibility on its part for the maintenance of world order and signifies its assent to the end of "isolation" and, to the modification, to some degree, of neutrality. Consultation involves not merely a simple committal; it means open acknowledgement of a new order, of an attempt to revolutionize the relations of states with one another. Since the very basis of the League of Nations is international solidarity, it is no wonder that in order to make that solidarity really of effect League members and friends of the League idea should endeavor to bring the United States into the ranks and to provide a link between America and the League so that the two may exert common pressure on behalf of world stability. The Pact of Paris furnished the link; American participation at a League Council session in 1931 when the Manchurian crisis began supplied the precedent; and a consultative pact would ensure a continuation of the practise and turn it into a definite legal obligation. The theoretical implications of consultation are vast. While the United States would not be committed to definite sanction measures, it would be tied to the prevention of war and pacific settlement machinery in very clear fashion. Upon America's willingness to consult depended not only the efficacy of the Pact of Paris and League endeavors to enforce peace, but also progress in disarmament which, despite Anglo-Saxon interpretations to the contrary, waits upon security, sanctions and collective action.

In his speech of 8 August, 1932, Secretary of State Stimson asserted that "consultation between the signatories of the Pact when faced with the threat of its violation becomes inevitable,"[15] and thus definitely read "consultation," just as he read "non-recognition," into the treaty. The Pact, under such an interpretation, thereby supplied the long-desired means for collaboration between the United States and the League, and brought the former into legal touch with Article 11 of the Covenant.[16] A Secretary of State's version, however, did not formally bind this country, and efforts continued to make the pledges to consult take definite treaty form. Both of the major American political parties included a "consultation plank" in their platforms of 1932. Senator Lodge must have cut some shadowy capers of dismay if he knew how his party, which had led the fight against the League of Nations, had come forward 12 years later to back a pact which would thrust the United States into the very sort of international

[15] Publications of the Dept. of State, No. 357, p. 11.
[16] See note 18 below.

cooperation he dreaded most, albeit by a somewhat devious route.

The latest developments in regard to consultation occurred at Geneva at the Conference on Limitation of Armaments in the spring of 1933, when it had become plain even to American and British eyes, that in order to bring about some limitation, concessions must be made to French ideas of security. A promise of consultation was the price demanded by France, and on May 24, after the British had offered a consultation plan, Norman Davis, chief American delegate, proposed a unilateral pledge as follows, "Recognizing that any breach or threat of a breach of the Pact of Paris, is a matter of concern for all signatories thereto, the government of the United States of America declares that, in the event of a breach or threat of a breach of this pact, it will be prepared to confer with the view of maintenance of the peace in the event that consultation for such purpose is arranged pursuant to Articles . . . to . . . of Part I of the disarmament convention."[17] Consultation was to enter as a definite sanction, not only for the Pact of Paris, but also for the disarmament convention, the former treaty serving as a bulwark for the latter, and although the United States would not bind itself to the consultation provisions of the disarmament treaty itself, it would give a unilateral pledge to join in the conference. This statement of Davis seemed to satisfy France, but no further steps have been taken to make a consultative pact a reality.

The significance of consultation lies not only in the fact that it in itself constitutes a treaty sanction, but that, at least according to French hopes, it is a preliminary to more active measures, as discussed above. Whether the United States would join in applying positive sanctions is a matter of doubt, but at least it seems likely that the American government would not insist upon its neutral rights and would be forced by the logic of the situation to favor an attacked or victim nation, if such could be distinguished. Passive support to the League or to the collectivity of nations would in all probability be assured. A consultation agreement appears to be as far as the United States is willing to go at present in the direction of taking active steps on behalf of world order, but that in itself would be of considerable theoretical as well as practical importance especially for the cause of disarmament, which in its turn is indissolubly connected with the whole general problem of reorganizing the state system.

It has been suggested previously that the termination of neutral

[17] *New York Times*, 25 May, 1933.

status on the part of third states, particularly influential ones, would constitute a real sanction for a belligerent violating the laws of war and neutrality. The coming into force of the Pact of Paris[18] has brought with it considerable conjecture and speculation as to its effect upon the laws of neutrality. If neutrality under the Pact were no longer possible, which is most doubtful, then one of the sanctions for the treaty would be the lack of neutrality on the part of all the other contractants who would be ranged in one way or another against a violator. The penalty thus would be considerable. To find such a sanction in the treaty, however, would be reading into its provisions considerably more than is there, manifestly, and to include it as a sanction authorized by treaty would be both inaccurate and extremely premature.[19] The sanctions of the Pact, except for the Stimson Doctrine, remain exceedingly vague which is as the United States, with its dread of definite obligations, would have it.[20] Nevertheless, the attempt made to add provisions for a conference of signatories when violation has occurred, is part of the tendency of the times to implement international agreements by substituting joint action for individual. Wherever there is provision for such common collaboration—collective guarantee, action by the Council of the League, or consultation between signatories as in the Four Power Pacific Pact and the Pact of Paris—a more uniform and definite application of penalties is assured. Consultation and exchange of views of course may happen and have happened when the treaty is silent on such procedure, but it is significant that efforts are being made to insert provisions for common action into treaties and to lessen the emphasis upon "self-help." Mutual collaboration, by itself, as in the Pacific Pact, may not seem much, particularly when compared to Article 16 of the Covenant where sanction measures are definitely

[18] See D. H. Miller, "The Pact of Paris," Chaps. XVIII and XIX. It is Miller's contention that the Pact links the United States with Article 11 of the League of Nations Covenant.

[19] Shotwell, *op. cit.*, 221–225. Although he states that "There is no legal obligation of the United States to join in police action" against a violator of the Pact, Prof. Shotwell contends that the preamble which reads in part "Any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished in this treaty" means that the United States could not be indifferent in the event the Pact is broken; the United States would be morally bound to collaborate with other signatories in dealing with a violator state. He optimistically states that "the sanctions problem is near solution." See Q. Wright, "The Meaning of the Pact of Paris," *A.J.I.L.*, January, 1933.

[20] See *Survey of American Foreign Relations*, 1929, 387–413. For Stimson Doctrine, see p. 171.

elaborated, but it is the results of such joint conference, the possibility of a united front against a violator, that make it important and give it vigor. The American delegation at London was quite aware of this when it declined to accept the proposal to confer in the event of a breach, as it had done in the Pacific agreement and in the nine-power treaty relating to China signed at Washington, 6 Feb., 1922.[21]

Article 16 of the League of Nations Covenant[22] represents the most ambitious attempt yet made for the application of sanctions by joint action between signatories, with the exception of course of the Geneva Protocol of 1924 which was not ratified. Volumes might be written in interpreting, analysing and commenting upon the terms of that article and upon the debates and writings centering around it. Paragraph 1 of the article stipulates that the non-military sanctions—" . . . severance of all trade and financial relations, prohibition of all intercourse between their nationals and the nationals of the covenant-breaking state etc."—shall be undertaken immediately by the other member states should any member "resort to war in disregard of its covenants." These sanctions are supposedly automatic and are meant to be applied immediately when a violation has taken place. Military sanctions, measures of force, however, are handled first through the Council whose duty it is "in such case to recommend to the several governments concerned what effective miltiary, naval or air force" they "shall severally contribute to the armed forces to be used to protect the covenants of the League." At first glance it all looks rather formidable, and it *is* formidable when compared to the provisions for sanctions provided in previous treaties. Here some 55 nations of the world band together to cooperate jointly against a breaker of the treaty terms—a large part of the economic and military force of the rest of the world apparently would be ranged against a violator. But just exactly what does it mean? How obligated are the members to conform to the recommendations of the Council? Suppose a member state refuses to apply the economic sanctions immediately, and further, ignores the Council's action in regard to measures of force. What then? Canada in 1921 proposed to find out more definitely the full implications of the article, advocated the repeal of Article 10,[23] and a resolution of the Assembly in October of that year helped to clarify the issue.[24] But it did not strengthen the sanctions. Apparently,

[21] De Martens, 3 me Série, XIV, 330.
[22] Treaty of Versailles; *ibid.*, XI, 323.
[23] Records of the Second Assembly, 1921, 835.

under the resolution member states are free to determine for themselves just what obligations they will assume. The lines which some had thought the article had drawn taut became slack, and the leeway of the individual members was seen to be considerable, for, among other things, the resolution stated that "it is the duty of each member of the League to decide for itself whether a breach of the Covenant had been committed" and "the unilateral action of the defaulting state cannot create a state of war; it merely entitles the other members of the League to resort to acts of war or to declare themselves in a state of war with a covenant breaking state."

The League of Nations, thus, has not suppressed the liberty of states to exact justice by themselves, for the collectivity which intervenes in a dispute has not the power to impose a decision. A legal sanction is a penalty for the violation of the law but where each state is both party and judge in a dispute the measures which would serve as a sanction are susceptible to use for political, not necessarily legal ends. The ideal of course would be to put the use of force and other possible forms of sanctions entirely at the disposal of the law; for this to happen a central collective agency to direct the use of sanctions, taking their employment entirely out of individual state control, would be necessary and the move toward collective action is under way. Article 16 is a start in that direction[25] but it is only a start for we are still in a period of transition "when nations will neither renounce altogether their own defense nor entrust it to some common army. Those means which may be needed for international sanctions also remain necessary for national security. How to make the same instru-

[24] League of Nations, *Official Journal*, October, 1921, special supplement, No. 6, 14–15. . . "3. The unilateral action of the defaulting state cannot create a state of war; it merely entitles the other members of the League to resort to acts of war or to declare themselves in a state of war with the covenant breaking state. . . . 4. It is the duty of each member of the League to decide for itself whether a breach of the Covenant has been committed."

The question as to the application of the provisions of Article 16 was first considered by the Council at its meeting, 3 August, 1920, at San Sebastian when it received a memorandum from the Secretary General suggesting that the First Assembly authorize the appointment of a Blockade Committee, First Assembly, Minutes of the Sixth Com., 334–336. The Blockade Committee, instituted by the Council, 22 February, 1921 at Paris, issued a report to the Second Assembly, League Doc. A28, 1921, v; Second Assembly, Minutes of the Third Com., 381. These reports and investigations were followed by the resolution of 4 October, 1921, supra.

[25] Politis, in *Revue Général de Droit Int. Pub.* (1924, 16) "C'est une période transitoire entre le pur droit de vengeance et la pleine organisation sociale, analogue à celle de la procédure formulaire romaine qui, après avoir succédé au systeme des actions de la loi, a été à son tour remplacée par la procédure extraordinaire."

ment serve those ends so that neither should suffer, and that the solution should be clear and frankly accepted by all—that in a nutshell is the practical side of the problem of sanctions, itself a part of the complex question of international security."[26] Since there is no superior force to guarantee order each state has "the exceptional right of self-defense."

Article 16 has brought to a head the controversy between those eager for a strong, central international agency with force of its own at its command and those who are distrustful of any sort of superstate authority, and these two points of view were clearly evident at the Peace Conference at Paris in 1919 where the former became known as the French plan, the latter as the Anglo-Saxon. The French aims were in line with a series of projects for centralized international control, dating back to that of Sully[27] in the 17th century and containing such schemes as those of the Abbé St. Pierre,[28] Rousseau,[29] Kant,[30] and Bentham.[31]

The so-called Anglo-Saxon position centered around the idea of compulsory arbitration and a moratorium on war, that is, a period of delay and investigation before engaging in hostilities. In the United States the League to Enforce Peace was organized which drew up a platform containing three essential points, first, a tribunal for the settlement of judicial disputes, secondly, a council of conciliation for the handling of non-justiciable controversies, and thirdly, a pledge among the powers to employ force against a signatory who goes to war against another signatory without first resorting to arbitration or conciliation. The germ of Article 16 may be seen in part three and undoubtedly President Wilson who was a member of the League was much influenced by its program.[32] This part three was bitterly op-

[26] Mitrany, *op. cit.*, p. 5.

[27] *Mémoires ou Economies Royales d'Etat domestiques, politiques et militaires de Henri le Grand.* 1662.

[28] *Paix Perpetuelle*, 1713.

[29] *Extrait du Projet de Paix Perp. de M. l'Abbé de St. Pierre.*

[30] *Eternal Peace*, 1795.

[31] *Principles of International Law*, Essay IV, 1789.

[32] See Bulletin 119, League to Enforce Peace, in which Wilson denied that he ever endorsed the "particular League plan." See Enforced Peace, Proceedings of First Annual National Assemblage of the League to Enforce Peace, Washington, 26–27 May, 1916. Program: . . . "The only restraint to be laid upon them (members of the proposed League of States) is that they shall not commence hostilities until they have stated their case to an impartial body," (page 14) and "members of the League shall agree that any power which violates this provision of the treaty shall be at once opposed by all the other members, with both their economic and military forces" (page 15). At the

posed by Bryan who held that it would oblige the United States to go to war to enforce the treaty should its formulation and ratification be consummated, and he concentrated his efforts upon the first two points the effects of which may be seen in the so-called Bryan "cooling-off" treaties which were a moratorium on war without any sanctions attached.[33] In England, Lord Bryce and Sir Edward Grey were active in the British League to Enforce Peace, both placing strong emphasis upon the provision that there should be no war unless a state had submitted a matter in dispute to an international conference.

Anglo-American emphasis was mainly upon conciliation and arbitration with considerable dispute and hesitancy about point 3 in the League's platform.[34] The sessions of the committee of the conference selected to draw up the articles of a world league were held at the Hotel Crillon in Paris, and the most important members were Wilson, House, Cecil, Smuts, Orlando, Bourgeois, Venizelos and Wellington Koo.[35] Cleavage was soon apparent after the filing of the projects for a League by Phillimore for Great Britain, Col. House for the United States, and Léon Bourgeois for France.[36] The first two stressed an organization for conciliation and arbitration and asserted a belief in the idea that states would abide by the decisions of international bodies without there being any need for a strong system of sanctions. The House plan did provide the basis for Article 10 by including a pledge of mutual guarantee, but it was the French through Bourgeois who developed elaborately a system of sanctions by which the Council of the League would have an international army under its control and supervision.[37] To this proposal Wilson replied that a distinction had

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Independence Hall conference of the League, 17 June, 1915, a fourth point in the program had been added calling for conferences of the states to codify the international law which the proposed international tribunal should apply. (League to Enforce Peace, Am. Branch, Independence Hall Conference Publication.)

[33] E.g. U. S.-France treaty, 15 September, 1914, Malloy, III, 2587.

[34] See League Bulletin 115, for the so-called "Victory Program" which merely said "provision to be made for enforcing its decisions (that of the tribunal)" and "what action shall be taken" is for "the League to decide where the parties do not acquiesce to conciliation." Also Bulletin 136 for the Paris Committee report which "opposed the establishment of an international police force in time of peace."

[35] For composition of the Committee of 19 which met for the first time, 3 February, 1919, see Temperly, *A History of the Peace Conference at Paris*, 1920, III, 54–58.

[36] For background of Article 16 see Chap. on Article 16 in Williams, *State Security and The League of Nations*, 1927; Lange, C. M., "Préparations de la Société des Nations pendant la Guerre" in *Les Origines et l'Oeuvre de la Société des Nations*, I, 52 *et seq.*; Temperley, *supra*, II, 24–25; Hindmarsh, *op. cit.*, Chaps. VII and VIII.

to be made between the possible and the impossible, that no nation would submit to an international military control which would "substitute international militarism for national militarism," and that the American people would never allow the United States army to be sent outside of the United States to engage in foreign wars.[38]

Bourgeois countered by stating that "control" in French means only inspection, not command, and that what was needed was not a permanent international army, but only an organization which, when the time came, would call out national groups to combat a menace. Each state would have a maximum army subject to League inspection.[39] This too was unfavorably received by the Americans and English, Lord Cecil declaring for the latter that England could not envisage any sort of international force or international inspection, and article 8 of the Covenant which contains the provisions with regard to the formulation of plans for disarmament is a triumph for the Anglo-American viewpoint[40] in that there is no reference to international supervision and inspection.[41]

The French also failed to obtain what they desired in the way of sanctions against a covenant breaker. Their program was scaled down until agreement upon the present Article 16 was reached, an article which leaves far more to individual state discretion than the members of the French delegation had hoped for. It is a half-way measure and establishes what Politis and Mitrany have referred to as a "transition position." Compulsory arbitration and conciliation, the heart of the Anglo-American program has been secured, but collective application of penalties and sanctions has lagged behind. Members of the League are no longer so free to indulge in "self-help' as formerly, yet they still possess a large measure of freedom.

After the coming into operation of the Covenant in 1920, the arguments in regard to sanctions has continued from both sides, those who

[37] For the French view of an international police force see Lange, *op. cit.*, 52; Baker, R. S., *Woodrow Wilson and World Settlement*, I, 281; text of the French plan, Baker, *supra*, III, 152–162; Temperley, *op. cit.*, II, 30; House, E. M., *What Really Happened at Paris*, 1921, Chap. XVII and pp. 410, 412–415; Nowak, K. F., *Versailles*, 1929, 107.

[38] Baker, *op. cit.*

[39] *Ibid.*

[40] Temperley, *supra.*

[41] Article 8. . . . "The Council, taking account of the geographical situation and circumstances of each state, shall formulate plans for such reduction for the consideration and action of the several governments. Such plans shall be subject to reconsideration and revision at least every ten years." No international body was set up to supervise and control states in regard to their military and naval forces, though Article 9 provides for a permanent advisory committee on miliary, naval and air questions.

think the provisions of Article 16 are too strong, and those (chiefly the French) who regard them as not strong enough. As a result of the Assembly resolution of 1921, previously mentioned, the Anglo-Saxon thesis was advanced further, for by that action, the sanction provisions were emasculated still more. The United States, and England to a lesser extent, have remained the champions of the view that the forces which may serve as the sanctions for the law and treaties should be reserved to national control and should not be subject to the beck and call only of an international body.[42] The prediction of Léon Bourgeois in 1920 that "recourse to force will not disappear entirely, but will cease to be the work of particular states and will become that of the collectivity of states that is, of the League of Nations"[43] has fallen far short of the truth. As Lloyd George once remarked, "the British navy may operate some day on behalf of the League but it is still the British navy,"[44] and the American view that "public opinion is the only true sanction" and that strong international sanctions of force (Senator Robinson, 1930) are to be opposed, has already been discussed.

The exact meaning of Article 16 has given the League members much trouble. The resolution of 1921 attempted to make clear that the use of force was optional and to define some of the possible economic and financial sanctions. These latter particularly have given rise to considerable debate. In regard to them, the original Article 16 adopted the nationality principle, that is, member states were to sever all economic and financial relations between their nationals and those of a covenant breaking state. Did this mean that nationals of a covenant breaker, residing abroad in a covenant observing state, were not to trade with other persons inside the same state? This embarrassing point was in a measure cleared up by a resolution of the Fifth Assembly which allowed a member to apply the economic sanctions on a territorial as well as a nationality basis.[45] Then, there were legal problems as to the position of states applying economic sanctions: would it mean war? Probably not, but how far short of war and when and how would neutrality laws be involved? In 1926 the Council

[42] Apparently, however, the U. S. has now accepted supervision of armaments by an international commission. This seems evident from the stand of the American members of the League Preparatory Commission. Documents of the Preparatory Commission, Series x, p. 250.

[43] Bourgeois, *Pour la Société des Nations*, I partie.

[44] Hadjiscos, D. N., *Les Sanctions Internationales de la Société des Nations.*

[45] Records of the Fifth Assembly, Minutes of the First Committee, 103.

asked the Secretariat in regard to "the legal position brought about by enforcing measures of economic pressure in time of peace" and the reply was given in July of the following year.[46] This answer, following the lead of the resolution of 1921, declared that it was for each member to decide what it would do and that whatever action was taken would not mean, of itself, a state of war. But to invoke these economic measures, methods of force might have to be applied and what then? Would force, used in such a connection, bring about the same legal situation, as its employment independently at the call of the Council? Whitton,[47] for example, says no, but so much uncertainty surrounds the possible use of the economic and financial measures, that many[48] favored the Geneva Protocol because, among other reasons, it made war in case of a breach more of a certainty and avoided the twilight, foggy zone of economic sanctions where the legal lines could not be clearly drawn.

Further, in regard to the military sanctions, many questions have arisen. If each state determines for itself how far it will follow the Council's recommendations, suppose then, some states apply measures of force and others do not. What is the relation of these latter to the two "belligerents," that is, the covenant breaker and the members applying force? Can they be neutral under the Covenant, and if not, what is their status? Similar questions have arisen regard-

[46] *Official Journal*, Council, 8th year, no. 7, July, 1927, 834. The report of the Secretary-General, entitled "Legal Position Arising from the Enforcement in Time of Peace of the Measures of Economic Pressure indicated in Article 16 of the Covenant, particularly by a Maritime Blockade." The report was divided into three parts: (a) Position as between the members applying the sanctions and the covenant breaking state. It was held that the aggressor has no legal right to demand formal resort to war before the taking of any particular kind of economic measure. War "depends upon intention." Drastic acts do not constitute war in themselves but the aggressor may regard the application of economic measures as war: the applying states may say it is peace but it is a question of policy on both sides whether the action taken will be considered as war. (b) Position as regards members of the League themselves: Some members may apply sanctions without violating the rights of other members. The non-applying ones must recognize the lawfulness of the action even if they do not think the Covenant was broken. (c) Position of Third States. Their rights must be fully respected but they cannot object to measures taken by League members in their own territory. As for territory outside, e.g. pacific blockade: 1. By sympathy, third states may let the blockade apply to their vessels. 2. The League may declare the situation one of war, making the blockade a belligerent one, throwing the moral responsibility for the war upon the third state or states. 3. Without war, the third state might treat the League and the aggressor as belligerents.

[47] "Neutrality and the League of Nations," *Acad. de Droit Int., Rec. des Cours*, XVII, 1927, 2.

[48] E.g. Miller, *The Geneva Protocol*, 73–81.

ing the Pact of Paris, though there no measures against a violator are mentioned in the treaty text.

The possibility of joint employment of measures of force has also led to the distinction between "public" or "international" and "private" war—the former would be when all other League members concerted to coerce a violator, the latter would be when two or more states not acting under League auspices go to War. "Public" war would be legitimate under the Covenant, that of a "private" character would be outlawed. If a sanctions system were attached to the Pact of Paris, the same sort of distinction would be made, no doubt. In this connection, problems arise as to the laws of war: would the customary regulations and rules be applied where the community of states was fighting a single recalcitrant member of the community? If only "public" war is now legal, under the Covenant, what becomes of neutrality? The British Labour government declared that so far as Great Britain was concerned, neutrality was a thing of the past.[49] How can members of the community remain neutral when that community is grappling with an "outlaw," a breaker of treaties and pledges? No satisfactory answer to these questions can be made; they have not had to be put to the test and all discussion of them must take place in the realms of theory. They are indicative, however, of what the international community has before it in the way of problems and legal readjustment if the trend toward international collaboration and supervision is maintained.

Not only is there great uncertainty about the application of the sanctions against a covenant breaker (a true instance of treaty sanctions) but much discussion as to whether members may use sanction measures, chiefly those of force short of war, outside the authority of the League, as among themselves. These measures might be taken when a member had broken the Covenant without the League having acted, or they might be employed when no violation of the Covenant had occurred. In either case, may the state employ them either without consulting the Council (for the first case) or without going through the League procedure for pacific settlement (for the second)? The controversy on this point became acute after the Corfu affair and a commission of jurists was appointed to decide. These latter turned in a very equivocal report which stated that measures of coercion short of war "may or may not be compatible with the Covenant" and that it was for the Council to decide in such a case.[50]

[49] G.B. Misc. Series, no. 12, (1930) Cmd. 3452.

The same problem arose in more acute fashion as a result of the Japanese activities in Manchuria beginning on the night of September 18, 1931. Here was a use of force, on a grand scale, without prior resort to the League procedure of pacific settlement. The Japanese claimed that it was a case of self-defense and asserted that the situation demanded instant action.[51] Does the Covenant, as does the Pact of Paris by common understanding, make allowance for self-defense? Article 12 states that "all disputes likely to lead to a rupture" must be submitted to pacific settlement. It is this article which the Japanese have violated, if they have infringed the Covenant at all. Their case, however, rested upon the claim that their dispute was not one "likely to lead to a rupture,"[52] since full diplomatic relations with China were maintained at all times, and further that their steps were ones of self-defense. The Lytton Commission[53] and the Assembly resolution[54] both stated the Japanese measures were not undertaken in legitimate self-defense, but these findings left two questions unsolved.

The first of these was: if Japan had acted in legitimate self-defense would such operations have been compatible with her Covenant obligations? The implications of the Assembly report would seem to point to an affirmative answer, but since the matter is not stated clearly, the problem as to whether self-defense is permissible under the Covenant is still unsettled. The opinion of many eminent statesmen and writers is that any use of force, in self-defense or not, is contrary to the obligations of League members,[55] and that Article 12 is all inclusive allowing of no exceptions. The matter probably cannot be settled without an amendment to the Covenant or a general agreement or understanding among League members, and such may be difficult to secure in the face of opposition, particularly on the part of larger powers which may well relish the present ambiguous situation, allowing as it does plenty of room for the discretionary use of national forces.

The second and immediate question left open by the Assembly findings was: since Japan had been found to have acted not in self-defense and to have violated her Covenant obligations (Art. 12),

[50] L'Hopital, *Les Moyens de Coercition autre que la guerre entre membres de la S.D.N.* pp. 81–84; *Off. Jour.*, 1924, p. 524.

[51] Japan's Case, *op. cit.*, p. 13.

[52] See Hindmarsh, *op. cit.*, p. 133.

[53] Report. Off. Doc. C663. M320, 1932, VII, p. 71.

[54] Report of the Assembly, Verdict of the League, 24 February, 1933, *op. cit.*

[55] See Eagleton, *The Attempt to Define War*, *op. cit.*, pp. 248–249.

what could the League do? Article 16 speaks of a "resort to war" as being necessary to bring the sanctions into operation but Japan had not "resorted to war." The word "war" had been substituted for force by a last minute change in the draft plan for a Covenant.[56] Somebody at Paris probably knew what he was doing when that alteration slipped through virtually unnoticed! As a result of this wording of Article 16 the League found itself in the weak position of declaring a state at fault and yet being practically impotent when it came to applying coercion. Perhaps, however, the situation was not so unhappy after all for the League members. They could join in the Assembly resolution, condemn Japan, thereby uphold the principles of the Covenant, and at the same time be relieved of any responsibility for further action. Under the very general terms of Articles 10 and 11, the Council might have advocated and taken the initiative in regard to the same type of sanctions provided for in Article 16. Why was such a course avoided? Simply because of the technical reasons that there was no threat of "war" and that legally the peace of the world remained intact? The causes for inaction, lying far below surface technicalities, rest upon the reluctance of states to apply sanctions, a hesitation to take drastic steps against a fellow member in the present stage of international relations. Changing the verbiage of Article 16 from "resort to war" to "resort to force" technically would obviate the difficulty caused by the present wording which allows a state to violate the Covenant without resorting to war, but practically would a mere change in form remedy a situation where the spirit for sanctions is lacking? What may have looked like a defect in the Covenant mechanism may turn out as a factor which saved the world's peace machinery from being thrown into high gear before the time was ripe for such developments. At any rate, League members were spared the dilemma of either defaulting upon their obligations or of being involved in possibly deadly combat with Japan. Article 16 was not put to a test and the League fell back upon the relatively innocuous nonrecognition doctrine, a sanction perhaps both Stimson and Heaven -sent at a crucial moment. More on the general problem of applying this variety of sanction will be mentioned shortly.

Confusion is to be expected where an "inbetween" situation, such as that established by Article 16, exists. It is not "self-help" in the old sense, and yet that direct application of sanctions by an impartial international body which, if the world were ready, would go so far

[56] Miller, *op. cit.*, pp. 213, 222.

toward putting force and penalties entirely at the service of the law has not yet come into being. It is a transition period in which there must be much groping and fumbling. The world is probably not yet prepared for an international army, and an international body to decide problems arising from law violation—the times are not ripe and the influence of the United States and Great Britain is probably beneficial in applying the brakes to an ambitious program which might break down if prematurely attempted.

Article 16, a half-way measure, is about as much as could be hoped for in the way of collective application of sanctions at the present time. Any discussion of it now must be highly academic because as yet its terms have never been tested. The Dutch objected to sending troops to Vilna[57] but that was not in connection with Article 16—supervision of a plebiscite was the matter in question. There is so much doubt as to the meaning of the article, so much fear that it would not work in a real crisis, that emphasis has been placed instead upon the war preventive articles of the Covenant rather than upon the sanction provisions. Professor Wehberg[58] holds that too much attention has been given to the League's sanctions, that they should not be too carefully worked out so as to operate automatically, because the Council must have leeway and be able to use its discretion. "Otherwise sanctions would run the League instead of the League running the sanctions." Also, one of the fathers of the Covenant, General Smuts,[59] has stated that one of the results of the first decade of experience with the League has been that of demonstrating the far greater relative importance of Article 11, that which makes any war or threat of war the business of the Council at any time, than the sanctions article which loomed so large at Paris in 1919. The League is concerned far more with preventing an infraction than with dealing with the sanctions for that infraction—sanctions the manner of whose functioning is extremely dubious.

In line with consultation, already suggested as a sanction of mutual collaboration to which the United States might subscribe, are schemes for an arms embargo and other types of economic sanctions for the Pact of Paris. Such sanctions added to the Pact would supply the latter with "teeth" or coercive measures analogous to those contained in Article 16, at least the non-military provisions of that article. Pro-

[57] Mitrany, *op. cit.*, p. 15.
[58] Lectures at *Institut des Hautes Etudes Internationales*, Geneva, January, 1929.
[59] Lecture at Boston, *Boston Herald*, 6 January, 1930.

moters of arrangements for embargoes and other measures are all interested in having the United States participate not only in consultation but in more active sanction pursuits. By supplying the Pact with an ample array of measures of this variety to which the United States would subscribe, the United States would be committed to much the same part in world organization as that of a member of the League, except for military obligations—that would be going too far. In other words, since American membership in the League of Nations seems out of the question for some time, most of the obligations of the Covenant such as territorial guarantee,[60] consultation and sanctions would be loaded on to the Pact of Paris so that the net result would be nearly equivalent to our joining the League. What a trick upon the isolationists if that frail and much ridiculed legal bark, the Pact of Paris, should somehow convey America to the League moorings after all! It is almost grotesque that such a fragile craft should have loaded upon it, legal sieve that it is, most of the League obligations once so obnoxious to American opinion.

The Capper and Burton resolutions, relating to embargoes and shipment of arms, previously cited,[61] were designed to answer the question so anxiously raised by League members, namely, "What would the United States do if the League ever attempted to invoke the provisions of Article 16?," but these were never officially acted upon by the American Congress, and agitation concerning the topic lapsed until renewed in the spring of 1933 when the House of Representatives passed the following resolution:[62] "That whenever the President finds that in any part of the world conditions exist such that the shipment of arms or munitions of war from countries which produce these commodities may promote or encourage the employment of force in the course of a dispute or conflict between nations, and, after securing the cooperation of such governments as the President deems necessary, he makes proclamation thereof, it shall be unlawful to export, or sell for export, except under such limitations and exceptions as the President prescribes, any arms or munitions of war from any place in the United States to such country or countries as he may designate, until otherwise ordered by the President or by Congress."

It is to be noted that this resolution speaks of an employment of force, not of war, going beyond Article 16 in that respect. It calls for

[60] See later, p. 173.
[61] See page 135.
[62] House Joint Resolution 93, 73rd Congress.

both consultation and the application of a definite measure by the United States, namely an embargo, when shipment of arms may "encourage the employment of force in the course of a dispute or conflict between nations." Since "the employment of force in the course of a dispute" indubitably is envisaged by the backers of the resolution as occurring only when the Pact of Paris (Article 2) or the Covenant of the League is infringed, this embargo measure would supply a sanction for the Pact and the Covenant. It could operate, according to the aims of its designers, against only one party to the dispute, the alleged "aggressor," and hence would involve a modification of the laws of neutrality. The United States would, in such a case, adopt a position of "partiality." The Constitutional question involved in the resolution which would confer vast powers upon the President are not relevant to the topic of sanctions as such, but they naturally caused the raising of many a Congressional eyebrow. The resolution, after passage in the House, met with strong opposition in the Senate where a group of Senators, led by Hiram Johnson of California, sought to amend the resolution by adding, "Any prohibition of export, or of sale for export, proclaimed under this regulation shall apply impartially to the dispute or conflict to which it refers unless otherwise ordered by Congress." This amendment would nullify the treaty sanction characteristics of the resolution, unless both parties to the dispute were violating the Pact or some other treaty for pacific settlement; it would signify no abandonment of neutrality or impartiality and would do nothing to bring the United States into step with the League. The essence of Article 16 under which the League theoretically would be acting is "partiality" and if the United States simply declared an embargo against both disputants, the cause of collective action would be no further advanced than it was by the "impartial" British embargo against both Japan and China in the spring of 1933. The Johnson amendment to the resolution would render the latter virtually useless so far as international sanctions are concerned and would distort the whole meaning of the original bill. The measure, to date, remains before the Senate as unfinished business.

Several other projects for supplying the Pact of Paris with sanctions and for heading the United States into obligations for joint collaboration and use of coercion when world peace is threatened have been brought forward. Among these are the suggestions of Prof. J. B. Whitton, made in an article entitled "What Follows the Pact of Paris?"[63]

in which he advocates economic and financial sanctions to make the Pact effective. Similar in nature were the proposals of the Committee on Economic Sanctions made public in March 1932.[64] All these schemes envisage American participation in agreements to collaborate and aid in the punishment of violators of fundamental pacts and covenants. They aim immediately at amendments to the Pact of Paris which would ultimately bring the United States within the orbit of the League sanctions, at least the non-military ones, under Article 16, and they all presuppose that the United States, acting through the President or some other authority and under the Pact, would choose the same aggressor the League selected, so that a united front would be displayed toward the recalcitrant member of the state community. Further, during the winter and spring of 1932–1933, there were many advocates of boycott and embargo proceedings against Japan, a point of view subjected to careful criticism by Prof. Hyde and others.[65]

It is sanctions of this type which probably most persons think of first when the topic of sanctions is mentioned. They are analogous to domestic police action, and imply the existence of a community which has abandoned neutrality and created joint agencies for maintaining order, and have become important since 1919 by reason of their inclusion in Article 16 of the Covenant, of their suggested use for the Pact of Paris and for their adoption in the constitution of the International Labor Organization. The sanctions for the provisions of that part of the Treaty of Versailles are set forth in Articles 409–420 and like Article 16, look rather formidable on paper. Here is an array of sanctions beginning with a mild variety and proceeding with ever increasing severity to more drastic ones, culminating in joint use of economic sanctions against an offender. Up to the present time, however, they have never been invoked. Other and more satisfactory means of bringing pressure to bear have been found.[66] These other methods of taking care of complaints and of securing the enforcement of the labor conventions have been of two sorts: one has been the activity of units of organized labor which have been on the alert for violations and which have forced the matter to the attention of governments and the Labor Office. This has happened in two or three instances. The other method has been the use of what Labor Office

[63] International Conciliation, No. 276.

[64] Published by the Twentieth Century Fund, 1932.

[65] *A.J.I.L.*, January, 1933.

[66] The information in regard to Labor Office sanctions was very kindly supplied by members of the Legal Staff of the International Labor Office in the summer of 1932.

officials term the "408 reports." By Article 408 of the Treaty of Versailles, states members of the Labor Organization are called upon to report to the conference each year the results of their experiences with the various Labor conventions and the extent of enforcement achieved. For the first few years these reports were turned in in perfunctory fashion and were almost completely ignored. After 1926, however, as a result of a British suggestion, a committee was appointed to scrutinize and collate these reports and to furnish the conference with its findings after this careful examination. As a result of this procedure, states members of the Labor Organization tend to vie with one another in having the clearest record in regard to enforcement of conventions. If some reports appear unsatisfactory, public criticism by other members of the Conference has not been unknown and under the whip of publicity, laggard powers have attempted to avoid further grounds for unfavorable comment by remedying the situations complained of.

Not only is this process of public discussion and criticism of the internal industrial and labor policies of nations significant from the point of view of theories of sovereignty, but it is also of importance for the subject of sanctions, in showing where a relatively simple process of free discussion and public debate can render superfluous an elaborate sanction mechanism. Perhaps the designers of the Disarmament Treaty might profit by this experience.[67]

It has been intimated during the discussion of this type of treaty sanction that there is deep reluctance to put it into actual operation, or rather to put into effect the most drastic measures, such as embargoes, boycotts and military action, under this form. The setting up and employment of this kind of sanction means a veritable revolution in the structure of international society, calling as it would for an abandonment of neutrality and the use of national agencies on behalf of international errands. Concepts of nationality and of isolation must be greatly modified before economic and military sanctions discussed in this section can ever be brought into effective operation. The question inevitably arises: is it not dangerous to formulate schemes for sanctions of this type and to insert them into treaties when the time scarcely seems propitious for advanced international action contemplated by such schemes? Is the world ready for economic and military sanctions, for an international police force? May not attempts to provide for such sanctions prematurely be positively

[67] Art. 53 of the Draft Convention, *op. cit.*

harmful and inimical to the good relations between nations? Sanctions of this kind imply the existence of a world in which aggressors or "criminals" can be agreed upon and in which common action against public enemies is feasible. Have we such a world? Many voices have been raised in protest against the attempt to pick aggressors and provide for sanctions on the grand scale and these protests and the questions here raised will be discussed in the conclusion.

Three types of mutual guarantee treaty exist:

a. Simple statement of mutual guarantee only.
b. Simple statement of mutual guarantee plus pledge to collaborate in conference when a breach takes place.
c. Guarantee plus pledge not only to join in conference but to take specific steps against a breaker of the treaty.

In the first two, (a) and (b), the sanction is only implied, though in (b) the possible unfavorable public opinion resulting from the act that a conference has had to be called to discuss an infringement, may constitute a sanction. In (c) definite sanctions are called for and a treaty breaker knows in advance with what measures it is likely to be confronted. In no one of the three, despite the strong implementation in (c), is the sanction automatic. The individual parties for themselves determine ultimately how effective the penalty shall be.

Article 16 of the League of Nations Covenant represents the most elaborate application of (c) yet in effect. As a result of devitalizing by Assembly resolutions and because the original wording in regard to military measures evidently indicated optional application on the part of members, the article really does not provide much stonger sanctions than does the far simpler provision (example of b) in the Four Power Pacific Pact of 1921. The signatory parties get together (through the Council in Article 16, by conference, in the Pacific Pact) to discuss a violation but what follows is not specified precisely, though of course League members are supposed to have applied economic sanctions immediately. With the exception of that difference, the two seem much the same. Inevitably, until there is a real international police force, there is the problem of a sanction for sanctions, of coercing the supposed coercers. Mutual collaboration is a big advance over individual action unrelated to the moves of others, but grave problems still remain.

The possibility of another sanction under type (c), in addition to the application of definite penalties, enters in the form of the non-

neutrality of signatory parties toward a violator state. Under Article 16, even where a state may not join actively in measures of coercion against a covenant breaking party, that state may not observe the traditional rules of neutrality. It might adopt an intermediate sort of position, difficult to define legally at present, which would be detrimental to the interests of the violator. Likewise, under the Pact of Paris, though no agreement to apply penalties is found in the text, it has been suggested that a violator of the treaty could not expect the other parties to remain neutral even though these latter take no positive steps of coercion. If such were the case, a real sanction, in addition to Mr. Stimson's highly prized public opinion would operate in connection with the pact. The effects of the pact upon neutrality, however, are for the present only conjecture.[68]

### *10. Loss of Territory, Cities, Goods, Revenues Pledged or Temporarily Held by the Other Party*

A fairly common method of insuring the enforcement of treaty stipulations has been that of pledging certain goods or immovable property to the party exacting performance. These goods or immovable property, the latter usually taking the form of definite territory, have not always been "actually placed in the possession of the creditor state" but sometimes have been "assigned over by some instrument without actual delivery by the party which 'hypothecates' them."[1] In transactions of this sort, actual title to the property or territory involved does not pass to the creditor state unless the treaty terms remain unfulfilled. The state from which performance is due preserves title, and exercises sovereignty over the thing or area in question, even if delivery has been made, unless it defaults or fails to live up to its obligations. It has no power however to assign the goods or territory to another party during the period of hypothecation. In the event of defalcation, the creditor state may assume title; however, private law principles in such cases have been difficult to apply because of the absence in the past of judges and courts before

[68] An additional sanction to the arbitration provisions of the Covenant is found in the last paragraph of Article 13: "In the event of any failure to carry out such an award, the Council shall propose what steps should be taken to give effect thereto." The threat of Council action here is a sanction more for the observance of an award after it is made than a sanction for the Covenant provisions calling for the submission of disputes to arbitral, judicial or conciliatory settlements. See Politis, *Justice Internationale*, p. 255.

[1] Phillimore, R., *Commentaries upon Int. Law*, II, 83.

whom questions of this type might be presented for adjudication.[2] A very definite sanction is involved in treaty stipulations of this character, however, for the pledging or debtor state knows that if it fails to perform as obligated, it faces the loss of goods or territory offered as a pledge. Where it is a question of military occupation by the creditor power, the sanction of the debtor lies in the threat of continued occupation if fulfillment is not made. Without a common judge, though, the weakness of the sanction is apparent; suppose treaty terms are complied with, yet the occupying or holding state refuses to evacuate or to return the property "pawned"; or suppose a given area is hypothecated without delivery, is the pledge of delivery of much value if the treaty terms for which the area is a gage are not complied with? Such problems and difficulties are obvious when no common enforcing agency exists above or between states. The "sanction for sanctions" question is ever apparent.

Instances of movable goods offered as a pledge or pawn are relatively very few. Poland at one time is reputed to have pledged the diamonds of the royal crown to Prussia as a security for treaty performance,[3] and in a treaty in 1775 between the British East India Company and an Indian prince, it was provided that the prince should deposit "jewels to the extent of Six Lacks of Rupees as security" for certain payments.[4]

More common has been the pledge of actual territory or fortresses or towns. At times these have been pledged without actual delivery to or seizure by the creditor party as when the Republic of Geneva in treaties of 1756, 1764, and 1768 made over Corsica to France as a security for debts,[5] and when the House of Savoy hypothecated Pays de Vaud to the cantons of Berne and Freiburg. In this last instance Savoy failed to pay the required debt and the territory was seized and detained by the two creditor cantons after the default.[6]

[2] Rivier, *Principes*, I, 257. "La chose donnée nantissement devient de plein droit le propriété de l'état créancier, si les obligations qui elle servait à garantir ne sont pas remplies; dans le même cas le créancier a le droit de s'emparer de la chose hypothequée." See also Pradier—Fodéré, *op. cit.*, II, 1165; Phillimore, *op. cit.;* Nys, *op. cit.*, Vol. III, De Martens *Traités*, I, 549; Phillipson, Coleman, *Termination of War and Treaties of Peace*, pp. 209–213.

Vattel, II, XVI, 240, states it is safer to demand a security or a pledge than a guarantee. The security ought to accomplish the promise in default of the principal party, while the guarantor is only obliged to do what depends upon him.

[3] Vattel, II, XVI, 241; Phillipson, *op. cit.*, 208.

[4] British East India Co. and Ragonot Row Ballajee Peishwah, (6 March, 1775), De Martens, *Traites*, Vol. II.

[5] Phillipson, *op. cit.*, 208.

Most common of all has been the actual occupation of territory pending the fulfillment of treaty obligations. This practise dates back several centuries, was used at the termination of the World War of 1914–1918 by the victorious Allies against Germany, and has "become the most important means of insuring the performance of certain stipulations of treaties of peace."[7]

Beginning with the treaty between Louis XIII of France and Savoy in 1629, by which the latter turned over temporarily the fortresses of Suze and Chasteau to France as surety,[8] there has been a long line of treaties containing sanctions of this variety. Another treaty between the same parties as above, in 1631, stipulated that Savoy again should deliver to France certain towns and fortresses as surety.[9] In more modern times, the use of military occupation has become even more frequent. By the convention of 1808 between France and Prussia,[10] the French armies remained in possession of the cities of Glogau, Stettin, and Custrin until the payment by Prussia of certain funds, and by Art. V of the Treaty of Paris, 20 Nov., 1815[11] the allied states maintained a force of 150,000 men along the frontiers of France. The occupation in this case, however, unlike those previously mentioned and so many of those to follow, was designed not so much as a guarantee for certain money payments as a measure looking toward the maintenance of peace.[12]

Occupation as a guarantee for financial payments has been the general rule, however, whenever it has been used as a treaty sanction. The British forces remained at Nanking until the Chinese had completed the payments envisaged in the treaty of 1842 between Great Britain and China[13] and by Article 7 and 8 of the Treaty of Frankfurt, 11 August, 1870,[14] it was arranged that the German army should progressively retire toward the frontier as the French made headway with their indemnity payments. In the convention with Siam, 3 Oct.,

[6] Phillimore, *op. cit.*, 83.

[7] Phillipson, *op. cit.*, 209.

[8] Dumont, V, II, 290.

[9] In this treaty the towns of Chasteau and Pigueral, and the forts of Perouze were involved. Dumont, VI, I, 20.

[10] De Martens, *Nouv. Rec.*, I, 102.

[11] De Martens, *ibid.*, II, 682.

[12] De Martens, *ibid.*, Art. V: "L'Etat d'inquietude et de fermentation . . . il a été indispensable de faire occuper pendant certain temps par un corps de troupes alliées des positions militaires le long des frontières de la France. . . ." See also Phillipson, *op. cit.*, 210.

[13] De Martens, *Nouv. Rec. Gén.*, I, IV, 484.

[14] De Martens, *ibid.*, XIX, 688.

1893,[15] France continued to occupy Choutoboun until the treaty terms were executed; and Article VIII of the Peace Treaty of Shimonoseki, 17 April, 1895, provided that "as a guarantee of the faithful performance of the stipulations of this act, China consents to the temporary occupation by the military forces of Japan of Wei-hai-wei in the Province of Shantung."[16] Similar to their occupation of Nanking in 1842 as a guarantee for financial payments, the British in 1904 in their treaty with Tibet[17] occupied the Chumbi Valley as security for the fulfillment of the indemnity provisions of the convention by Tibet.

There was thus before 1919 a number of precedents for the use of armies of occupation as a means of insuring treaty observance, and Articles 428–431 of the Treaty of Versailles[18] fall into line with this precedent of long standing. These Articles 428–431 will bear some analysis:

> Article 428: As a guarantee for the execution of the present treaty by Germany, the German territory west of the Rhine together with the bridgeheads will be occupied by Allied . . . troops for a period of 15 years from coming into force of the present treaty.
>
> 429: If the conditions . . . are faithfully carried out by Germany the occupation . . . will be successively restricted.
>
> 430: In case either during the occupation or after the expiration of the 15 years referred to above, the Reparations Commission finds that Germany refuses to observe the whole or part of her obligations under the present treaty in regard to reparations, the whole or part of the areas specified in Article 429 will be reoccupied immediately by the Allied and Associated Powers.
>
> 431: If before the expiration of the period of 15 years, Germany complies with all the undertakings resulting from the present treaty, the occupying forces will be withdrawn immediately.

In the Versailles Treaty military occupation was thus used as a guarantee both for the general stipulations of the treaty (Art. 429) and also specifically for financial or reparation payments (Art. 430). The sanction for Germany lay in the threat of a continuance of the occupation for the full fifteen year period if the treaty terms were not fulfilled, and in the threat of a re-occupation of any territory already evacuated, if any default in reparations should occur.[19] An additional

[15] *Ibid.*, 2 me Série, XX, 173.
[16] *Ibid.*, XXI, 642.
[17] 7 September, 1904, *Ibid.*, XXXV, 448.
[18] *Ibid.*, 3 me Série, XI, 323.
[19] The Protocol at Spa, (16 July, 1920), De Martens, *Nouv. Rec. Gén.*, XIII, 618, also provided that, "If by September 1, 1920 the executive and legislative measures

sanction for the reparations provisions of the treaty was inserted in Par. 18 of Annex II of Part VIII (Reparations Section) of the Treaty which reads:[20]

> The measures which the Allied and Associated Powers shall have the right to take in case of voluntary default by Germany, and which Germany agrees not to regard as acts of war, may include economic and financial reprisals, and in general such other measures as the respective governments may determine to be necessary under the circumstances.

The French in 1923 contended that this paragraph justified the occupation of the Ruhr, a region outside the areas specified in Articles 428–430 which allowed only for a re-occupation of territories already evacuated, in the event of reparation default by Germany. (Art. 430) By their action the French extended the scope of the military occupation sanction and both the Germans and British declared that the occupation was illegal, holding that "such other measures" should be construed to mean only "such other economic and financial" measures, and that the occupation of German territory east of the Rhine was contrary to the treaty provisions.[21] Such a view seems to be the valid one inasmuch as articles 428–430 pertain only to definite territory west of the Rhine plus the bridgeheads; the French appear to have read too much into paragraph 18, and to have extended the application of the military sanction beyond all proper limit.

Because of the agreement between the former Allied Powers and Germany, made at the Hague, 30 August, 1929[22] according to which the occupation of the Rhineland was brought to an end, military occupation has ceased as a sanction for the Treaty of Versailles. The threat of continued occupation no longer remains as a sanction for the fulfillment of the treaty terms. A sanction for the performance of the Young Plan payments however exists in the threat implied in Annex I[23] of the Final Act of The Hague Conference of 1930 which states that in the event that the Permanent Court of International Justice determines that "the German Government has committed

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have not been taken and have not received the widest publicity . . . or if by October 1, 1920 the German army has not been reduced to the number of 150,000 men . . . the Allies will proceed to a further occupation of German territory."

[20] See p. 106 for a dicussion of this paragraph from another point of view.

[21] See McNair, "The Legality of the Occupation of the Ruhr," *The British Yearbook of Int. Law*, 1924; Schuster, "The Question as to the Legality of the Ruhr Occupation," *A.J.I.L.*, July, 1924.

[22] British Command Paper 3417. See also The Final Act of The Hague Conference on Reparations, January, 1930, British Papers, Misc. 4 (1930) Cmd. 3484, pp. 14–17.

[23] British Command Papers, 3484, pp. 28–30.

acts revealing its determination to destroy the New Plan" the creditor powers shall "resume their full liberty of action." If the Court should ever come to such a conclusion, Germany would be confronted with the possibility of a renewed occupation of her territory or of any other measures of coercion which the creditor states might adopt. Such a sanction, however, is not of the type considered in this section—it would not be occupation of a territory or seizure of goods as a pledge of good performance, but would be a sanction of the character considered elsewhere in this volume where the authorization of reprisals and measures of force was under consideration.

Territorial occupation and pledging of goods or fortresses is a sanction which induces performance on the part of a state because that state desires to get back the territory or property pledged or occupied as soon as possible. This is very different from a sanction, like authorization of measures of coercion, which tends to bring performance through the fear of perhaps losing territory, property, or possessions which have not already been given over as security.

A much used sanction for treaty observance has been the pledging of certain territories of goods as security. Where this sanction has been employed, the goods pledged have almost always been immovable in character, only a few examples of movable property as a pledge having been discovered. The sanction in such a case consists in the fear of losing permanently the property "hypothecated" or pledged to the other party and the weakness of the sanction lies in the fact that hitherto there have existed no courts or international agencies to regulate the delivery of the property concerned or to judge whether all the obligations of both parties had been properly fulfilled; all questions had to be settled by the individual parties concerned with the inevitable result that political rather than strictly legal considerations prevailed. Allied to this type of sanction has been that of military occupation, a measure frequently employed by a power victorious in war to secure the fulfillment of certain treaty terms. It was used after the last war and only ceased as a sanction for the Treaty of Versailles with the evacuation of the Rhineland in 1930.

### *11. Termination of the Treaty; Loss of Reciprocal Advantages, Privileges, and Advantageous Status*

It has long been held that a violation of a treaty by one party gives the injured state the option of declaring the agreement void.[1] Infringement by one contractant makes the treaty "voidable, not void,"[2]

it being for the other contractant to determine whether the treaty shall be abrogated or remain in force.[3] A sanction for treaties exists, independent of any particular treaty stipulations, in this general principle that the aggrieved party may terminate the agreement when violation has taken place; the violator party faces the possibility that the whole treaty may be annulled if it infringes upon the terms. Such a sanction may or may not be effective, depending upon how beneficial to itself a state contemplating infraction would consider the continuance in force of the treaty.

In addition to this general principle, some treaties have definitely specified that violation of any of its provisions or failure to execute its terms, means the abrogation of the pact. Here again the vigor of the sanction must depend upon the benefits afforded by the treaty, and upon the attitude toward such benefits on the part of the state considering violation. If such a state deems that it is receiving small advantage from having the treaty in force, the threat of termination of the agreement would constitute a sanction of no great deterrent value. A treaty between Persia and the Eastern Roman Empire, 561 A.D. offers an early illustration of this variety of sanction:[4] by article 8 of the treaty both parties agree to erect no fortifications along their joint frontiers and it is further stipulated that if this article should be contravened by either contractant, the "treaty shall be automatically cancelled." Similarly a treaty of alliance in 1408, between the Bishop of Metz, Duke de Bar, and the Marquis du Pont offers a medieval example. In this agreement it was stated that failure on the part of any party to execute the treaty terms would mean the cancellation of the entire treaty.[5] Where the treaty like the one above is one of alliance, strong political considerations may enter in to give increased force to the sanction; not only would the whole treaty fall through violation, but all that it represents, namely an alliance of political support, would terminate for the party infringing upon its provisions.

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[1] Grotius, *De Jure Belli ac Pacis*, III, XX, 38; Vattel, *op. cit.*, 452; 7 Kent Comm., 175; Moore, *op. cit.*, V, 566.

[2] *Charlton* v. *Kelly*, 229 U. S. 447.

[3] See Hall, Higgins; 7 Ed., par. 116, Jesse S. Reeves, "The Prussian-American Treaties," *Am. J. Int. Law*, XI, 475.

[4] Barbeyrac, II, 197.

[5] Dumont, II, I, 320, "Se l'un desdits Alliez . . . alloit de vie a trespassment avant la dite execution . . . que lesdites alliances et Convenances fussent du tout expires et mises a neant."

In the 19th century, the treaty termination sanction began to be employed in conventions relating to commerce; in these agreements it was sometimes provided that where certain articles were violated by one party, the other party was given a definite period within which it might denounce the convention.[6] Likewise in the 1921 Trade Agreement between Great Britain and the Union of Socialist Soviet Republics it was provided that "in the event of the infringement by either party at any time of the provisions of this agreement . . . the other party shall immediately be free from the obligations of the agreement."[7]

A bit different from and yet very much akin to this sanction of treaty abrogation is another sanction, involving not necessarily the formal termination of the whole treaty or of all the obligations contained therein, but rather the loss of certain benefits, privileges and immunities which the treaty confers. The presence of this sanction is made manifest sometimes by direct statement in the treaty text, while sometimes it has to be inferred a bit indirectly from the provisions of the agreement, as in some of the Hague Conventions of 1899 and 1907.

An example of the direct statement type is furnished by Art V of the Clayton-Bulwer Treaty between the United States and Great Britain in 1850[8] by which the neutrality of the canal to be constructed is guaranteed, but which specifies that the neutrality guaranty will be withdrawn if the intentions of the convention are not followed. This is a very neat and precise treaty sanction: each party says "observe the treaty and we shall guarantee neutrality. If you do not observe the convention, then the guaranty will be withdrawn." A treaty between Turkey and Persia in 1875 in regard to the treatment of each other's citizens in their respective territories, states that every clause

[6] E.g. Belgium and Sardinia (24 January, 1851), De Martens, Cussy, v, 474, Art. XXIX, "Dans le cas ou l'une . . . des parties . . . par l'effet d'une mésure législative rendrait d'application général les faveurs qu'elles concèdent . . . la partie qui se croira lésée aura pendant six mois . . . le droit de dénoncer le present traité qui cessera ces effets un an après que cette dénonciation aura été faite à l'autre partie." Also France-Belgium (16 July, 1842), De Martens, *Nouv. Rec. Gén.*, III, 385 for a similar article.

[7] De Martens, *Nouv. Rec. Gén.*, 3 me Série, XVIII, 684.

[8] De Martens, Cussy, v, 386, "The contracting parties . . . will guarantee the neutrality thereof (the canal). . . . This protection and guaranty are granted conditionally and mav be withdrawn by both governments . . . should the person or persons undertaking or making the same adopt or establish such regulations concerning traffic thereupon as are contrary to the spirit and intentions of this convention either by making unfair discrimination in favor of the commerce of one of the parties . . . by imposing oppressive exactions or unreasonable tolls. . . ."

of the convention not carried out by Persia in regard to Ottomans shall likewise cease to be valid in Turkey in regard to Persians and vice-versa.[9] Here again a very definite sanction is provided: "If you do not treat my subjects as agreed upon," says each party, "then I shan't treat yours with any favors." It is a reciprocal type of sanction, needing no courts or outside agencies to make it effective; the simple wording of the text offers strong inducement for performance.

The loss of privileges and immunities as a treaty sanction appears most frequently in the great international conventions of the second half of the 19th century and the early 20th. Article 14 of the Geneva Red Cross Convention, 22 August, 1864[10] read, "In maritime wars every strong presumption that one of the belligerents profits from the neutrality in any other way except to the wounded and sick permits the other belligerent, unless proved to the contrary, to suspend the convention in regard to that other belligerent." Violation of the convention on the part of one party as a belligerent involved the possibility that the other belligerent would suspend the entire convention in regard to the violator. Under a convention such as this both belligerents benefit from the immunity of hospitals, ambulances, hospital ships, etc., and to lose all the privileges and immunities of the convention would entail considerable suffering and discomfort on the part of the state against whom the convention had been suspended. The threat of such discomfort and suffering in Article 14 makes for a sanction of no small importance.

The Hague conventions of 1899 and 1907 and the Convention for Amelioration of the Condition of the Wounded in Armies in the Field 6 July, 1906 are replete with sanctions of an order similar to those just discussed. Article 7 of the 1906 Geneva Convention[11] states, "The protection due to sanitary formations and establishments ceases if they are used to commit acts injurious to the enemy." Here again the sanction becomes virtually automatic; violation of the intent of the convention means the loss of protection for the violating party. Hague Convention III (1907)[12] relative to the opening of hostilities contains a very ingenious sanction; the declaration of war must be notified without delay to neutral powers and such declaration does

[9] De Martens, *Nouv. Rec. Gén.*, 2 me. Série, III, 526.

[10] De Martens, *Nouv. Rec. Gén.*, XVIII, 607.

[11] De Martens, *Nouv. Rec. Gén.*, 3 me. Série, II, 670.

[12] J. B. Scott, Collection, *op. cit.*, "Art. 2. The existence of a state of war must be notified to the neutral powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may, however, be given by telegraph...."

not become effective so far as those neutral powers are concerned until notification has been received. In other words, unless the terms of the convention are adhered to and notification of a state of war is made, the belligerent making war cannot legally demand the neutral behavior on the part of third states, and cannot expect to receive the benefits derived from the application of the laws of neutrality. The sanction lies in the knowledge on the part of the state going to war that unless it observes the convention it has no legal right to demand neutral behavior from third states; the sanction here, too, is automatic —the belligerent party has the choice of abiding by the convention or of facing the prospect of "unneutral behavior" (from its point of view) on the part of other nations.

Some of the sanctions of Convention IV, 1907, respecting the laws and customs of war on land,[13] as they apply to individuals as well as to states, might be more properly considered under Part B, but it seems much better to group together all the Hague Convention sanctions, of the variety under consideration, as a unit. Even where individuals are concerned under this convention, they would normally be operating as state agents, would receive their orders from the state, and hence the sanctions may be said to apply to states as well as to individuals.[14] It must be recognized further that some of the apparent sanctions of these Hague Conventions are not really genuine treaty sanctions: they do not threaten the loss of privileges and advantages for infringement of specifically called for or prohibited sections under the convention. For example, Article 2 of Convention IV reads, "The population (in a levee en masse) . . . shall be regarded as belligerent if they carry arms openly and if they respect the laws and customs of war." If members of a levee en masse fail to carry arms openly or to observe the rules of war they lose their belligerent status, but the convention does not say that they must carry arms openly. It merely states that if they do not, they lose a certain status. Likewise Article 27 states:

> In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, charity, historical monuments, hospitals and places where the sick and wounded are collected, *provided* they are not used at the same time for military purposes.

The convention does not declare that edifices devoted to art, science

[13] J. B. Scott, *ibid.*

[14] Only individuals appear to be concerned in Art. 9 of Convention IV concerning prisoners. Here the sanction is unusually explicit.

and religion must not be used for military purposes; it simply states that if they are so used, such use not being counter to the convention, they lose their immunity.

Article 40 and Article 17 of Convention IV do not contain true treaty sanctions. Article 40:

> Any serious violation of the armistice by one of the parties gives the other party the right to denounce it, and even in case of urgency, to recommence hostilities at once.

Article 17:

> A neutral cannot avail himself of his neutrality:
>
> a. If he commits hostile acts against belligerents;
> b. If he commits acts in favor of a belligerent.

In the case of Article 40 the Convention does not declare that the armistice must not be violated; it merely says that "if the armistice is violated, such and such will follow." The such and such is not a result of treaty violation, but of an armistice violation; it is not the threat of a penalty for a violation of the convention itself. This distinction between a true treaty sanction and a sanction for something specifically prohibited or demanded by a convention—and the consequences of some act not prohibited or demanded by the treaty itself[15]—is sometimes a difficult one to make, but it does not appear justifiable to include the articles just mentioned as true treaty sanctions, though they may be on the border line along with Article I of the Convention VII[16] relating to the transfer of merchant ships into vessels of war, which specifies that no merchant vessel, transferred into the warship class, may enjoy the rights and obligations of vessels of that class unless it is under the immediate control of the power whose flag it flies. This article definitely seems to call for the direct control on the part of the flag state, and includes as a sanction the threat of the loss of the rights and obligations of war vessels. Likewise, the sanction for the communication provision of Article 1 of Convention X for the Adaptation to Naval War of the Principles of the Geneva Convention,[17] lies in the fact that ships whose names have not

[15] For example, two states in a treaty may say that if a third state does not act in a certain way, they will take measures against it. This is not a treaty sanction; the political arrangement under the treaty may be a sanction for the conduct of the third party referred to, but that is all.

[16] J. B. Scott, Collection, *op. cit.*, "A merchant ship converted into a warship can not have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control, and responsibility of the Power whose flag it flies."

[17] *Ibid.*, Art. 1 "Military hospital ships, etc., the names of which have been com-

been communicated will not enjoy immunity from capture. Article 3 of Convention XI Relating to the Exercise of the Right of Capture in Naval War[18] states that "vessels used exclusively for fishing along the coast or small boats employed in local trade are exempt from capture. . . . They cease to be exempt as soon as they take any part whatever in the hostilities." Once more the query arises, is the second sentence of the article a treaty sanction? Does the treaty state that certain vessels must be used exclusively for fishing or local trade, and that if they are not so used, the penalty follows? Obviously, it does not. By such reasoning, the second sentence probably does not constitute a sanction, but if the article is interpreted as saying that fishing and coast-wise vessels must not take part in hostilities, then the second sentence is a genuine treaty sanction. The treaty, however, does not seem as positive as that, and apparently says "as long as coast-wise craft refrain from hostile activity they will be immune." It is a mere declaration to the effect that if certain conditions are lived up to, certain results will follow. Participation by a fishing smack in belligerent activities would not seem to be counter to the convention provisions, so that sentence two scarcely can be said to involve a treaty sanction. The convention does state that fishing vessels are exempt from capture as long as they refrain from belligerent activities, but there is no sanction to apply as against a party which makes a capture contrary to the exemption clause. A provision on that subject would have constituted a treaty sanction unmistakably.

In the Declaration of London, 1909[19] a sanction for the declaration of blockade provisions in Articles 9 and 11 is found in the wording of Article 8: "A blockade in order to be binding, must be declared in accordance with Article 9, and notified in accordance with Articles 11 and 16." Articles 9, 11 and 16 specify the methods of notification and declaration, and if they are not followed, the power failing to observe them meets the sanction implied in Article 8, namely that the blockade will not be considered binding. The advantages of a binding blockade will be lost unless Articles 9, 11 and 16 are observed. The convention offers those advantages upon certain terms; those terms must be fulfilled if the advantages are to be obtained.

municated to the belligerent Powers at the commencement or during the course of hostilities, and in any case before they are employed, shall be respected and cannot be captured while hostilities last."

[18] Scott, *Ibid.*

[19] *Ibid.*, Art. 9, "A declaration of blockade is made either by the blockading Power or the naval authorities acting in its name. It specified:

Somewhat similar in character is Article 2 of the Convention on Aerial Navigation, signed at Paris, 13 October 1919.[20] By complying with the terms of the convention, each contracting party is entitled to the right of innocent passage through the air space of the other contractants. Non-adherence to the treaty terms entailed the loss of the advantages gained by the treaty, the sanction operating in a very direct and precise fashion. Almost identical were the articles placed in other aerial conventions made after 1919.[21]

At this point may be raised again the question as to the implications of the preamble to the Pact of Paris.[22] The preamble declares "any signatory Power which shall hereafter seek to promote its national interests by resort to war shall be denied the benefits furnished by this treaty." This statement brings the Pact into any discussion of the sanction treated in this section, namely the threatened loss of advantages and privileges under a treaty. Interpreting the above given wording of the Pact's preamble, it obviously seems to mean that any violator state cannot expect the other parties not to promote their national interests by a resort to war after infraction has occurred. Since the preamble refers to a "resort to war" as the step by which the benefits under the treaty are lost, it has been suggested that a state may violate Article 2, that is, by employing non-pacific means short of war, without incurring any loss of benefits and that only violation of Article 1, actual resort to war, brings an end to the benefits under the treaty.[23] But do non-pacific means which are not war exist? According to one interpretation the word "pacific" is broader than "amicable"[24] and includes all measures, even those of

1. The date when blockade begins,
2. The geographical limits of the coast blockaded,
3. The delay to be allowed to neutral vessels for departure.

Art. 11: A declaration of blockade is notified—

1. To the neutral powers by the blockading power by means of a communication addressed to the governments themselves or to their Representatives accredited to it.
2. To the local authorities by officer commanding blockade force."

[20] De Martens, *Nouv. Rec. Gén.*, 3 me. série, XIII, Art. 2: "Chaque état contractant s'engage à accorder en temps de paix aux aeronefs des autres états contractants la liberté de passage inoffensif audessus de son territoire pourvu que les conditions établies dans la présent convention soient observées."

[21] E.g. Denmark and Great Britain (23 December, 1920), De Martens, *Nouv. Rec. Gén.*, 3 me. série, XV, 838; Sweden and Great Britain, (5 March, 1924), *ibid.*

[22] See pp. 154–155.

[23] Wright, Q., *The Meaning of the Pact of Paris, op. cit.*

[24] Wilson and Tucker, *International Law*, Chap. XV.

force, actually short of war. Under such an interpretation, only a formal resort to war, a step absolutely non-pacific, could violate Article 2, in which event both articles of the Pact would be infringed simultaneously. By such reasoning, Article 2 could only be violated when Article 1 is. Whatever the interpretation of "pacific," however, and whether Article 2 could be violated without forfeit of the "benefits," it is only a resort to war which entails a loss of the privileges under the treaty. The benefits of the treaty must be that each party can hold the other parties to the agreement not to use war as an instrument of national policy. After violation by one contractant, the liberty to use war as an instrument of national policy is regained by the other signatories, and the violator is no longer entitled to this abstention from war. Just what the actual status and obligations of all parties would be in such a situation is still necessarily uncertain. Does it mean that the other signatories would go to war against a violator? Apparently they may, but are not legally obliged to do so;[25] though the moral obligation might be strong.[26] Does it mean that without actually going to war, the parties may adopt a position which is short of war, but too hostile for neutrality? Such a shady zone has yet to be legally clarified, as was seen in the discussion of the problem raised by Article 16 of the League of Nations Covenant.[27] The full meaning of the preamble can hardly be known until the Pact has been put to more of a test. To date no signatory state has resorted to war in a situation to which the Pact applies. Japan, Columbia and Peru entered into no state of war, and the Paraguayan declaration on May 10, 1933[28] did not involve the Pact because Bolivia never ratified the treaty. In the meantime the Pact does contain a vague sort of sanction for violation, a sanction which threatens the violating party with the possibility that the other signatories will not feel themselves obligated to refrain from war-like measures, and that they will perhaps feel called upon to take steps of a definitely hostile character. The question of the meaning of the Pact's preamble was injected into the Columbian-Peruvian dispute over Leticia by the note of Secretary Stimson to Peru on January 25, 1933.[29] Since there had been no "resort to war" the Secretary's reference seemed scarcely

[25] See Shotwell, *op. cit.*, pp. 222–225.
[26] *Ibid.*
[27] See p. 148.
[28] *New York Times*, 11 May, 1933.
[29] Dept. of State, Press Releases, 28 January, 1933.

applicable. Contending that "forcible and armed support of the illegal occupation of Leticia" would be "entirely contrary to Article 2 of the provisions" of the Pact, the Secretary declared that "such a violation of it would entail a denial of the benefits furnished by that Pact to the signatory power which violated it."[30] The Secretary was here assuming that the actions of Peru which were short of war were non-pacific and therefore constituted an infringement of Article 2, a debatable point, but even if Article 2 were being infringed under this construction, the preamble's mention of benefits would not have been involved without a "resort to war" as previously pointed out.[31] In any case, even if there had been a resort to war, the Secretary's statement shed no further light upon the meaning of the preamble which remains as vague as ever; in his speech of August 8, 1932,[32] Mr. Stimson said, "The correspondence of the framers of the treaty shows that they intended it to be a treaty which would confer benefits, which might be lost by a violation thereof," but again the benefits remain undefined.

This sanction of the threatened loss of advantages and privileges if the treaty is violated is the most automatic of any of the sanctions considered up to this point. It works by itself, and it depends upon no outside factors such as the willingness of third parties to co-operate as is the case with treaties of guarantee, and measures contemplated by Article 16 of the Covenant. Provided it is clear just what the advantages and privileges to be lost through infringement are—which is not the case under the Pact of Paris where the full meaning is by no means apparent—it seems to be the most effective treaty sanction yet devised, and it is comparable to the sanctions of nullity,[33] discussed by municipal lawyers.

*12. Nullity of Acts Counter to a Treaty*

Even more analogous to the municipal law sanctions of nullity are the provisions found in some treaties to the effect that acts made in opposition to the treaty or counter to its contents shall be void and of no effect. This sanction is somewhat similar to the one considered in the previous section where a loss of benefits, privileges, and advantages was involved; but here the sanction threat is couched in terms

[30] *Ibid.*
[31] Wright, *Meaning of the Pact of Paris, op. cit.*
[32] Dept of State, Publication No. 357.
[33] See p. 51.

which imply that measures contrary to its purport are null, void, or illegal. The number of examples of a sanction of this sort are relatively few but because it is in some proposed conventions that its use has been strongly advocated and because of Secretary Stimson's interpretation of the Pact of Paris it merits considerable attention.

In the treaty of Alliance of 1579 between certain cities and provinces of Holland, the various parties agreed to abide by the terms of the agreement, and to regard any action infringing upon its provisions as null and void.[1] Just how much of a sanction such a provision amounts to is not certain. If a party succeeds in maintaining an action against the treaty, the opinion of the other signatories that the action is null and void can be of little effect. Only if the other signatories are in a position to enforce the treaty, feel called upon to act, and take definite steps to force the violator into recanting, or into paying damages, or making restitution, can the "null and void" statement be made to mean anything at all effectual.[2] The lack of a court or of a definite law to be applied makes any such "nullity" statement in a treaty mean very little, especially when compared to the municipal law situation where the sovereign is in a position to make the individual offender feel the nullity sanction as a genuinely effective deterrent.[3]

In connection with territorial aggrandizement and the cession of territory through conquest, the sanction of nullity has received strong support at two Pan-American conferences. At the first Pan-American Conference held in Washington in 1889, a recommendation was passed to the following effect:

First, that the principle of conquest shall not during the continuance of the treaty of arbitration be recognized as admissible under American public law.

Second, that all cessions of territory made during the continuance of the treaty of arbitration shall be void if made under threat of war or the presence of an armed force.[4]

[1] Dumont, V, I, 322, Art. 23: "Tous lesquels Poincts et Articles et chacun d'eux en particulier, lesdites Provinces Unies ont promis . . . d'accomplir et entretenir et de faire accomplir et entretenir, sans y contrevenir ni souffrir y estre contravenu directement ou indirectement en aucune maniere. Et si avant qu'aucune chose se fasse en attente au contraire par aucune d'entre eux, que des maintenant et pour lors ils le declarent nul et de nulle valeur."

[2] See later p. 179.

[3] Korkunov, *op. cit.*

[4] De Martens, *ibid.*, 3 me. série, VI, 114.

This same idea was incorporated in Projet 30 of the proposed codification of Pan-American International Law (1925) and has been championed by Mr. S. O. Levinson who has proposed that:

> In the future all annexations and territorial acquisitions by means of war or under the menace of war, or in the presence of armed force, and all seizures or exactions by force, duress, or fraud shall be null and void.[5]

Such was some of the American background for the interpretation of the Pact of Paris announced to the world on 7 January, 1932 by Secretary of State Stimson in notes to the governments of China and Japan when he stated that "the American Government . . . does not intend to recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris. . . . "[6] A definite sanction was thus read into the Pact of Paris by the American Secretary of State, namely, non-recognition by the American Government of "any situation, treaty, or agreement" which came into being by means in conflict with the Pact. Such means could only be a resort to war "as an instrument of national policy" (Article 1) or the settlement of a dispute by non-pacific means, (Article 2). It should be clear from the outset that this sanction of non-recognition had its origin, not in any specific provision in the treaty itself, but only as an interpretation by the American Secretary of State. Further, the doctrine did not say directly that treaties or situations created by methods contrary to the Pact were illegal, null or void; it simply said that they would not be recognized by the United States. By implication they would be illegal, at least in American eyes, but such a pronouncement and judgment of one government, in the present state of international society, cannot legally affect the validity of agreements concluded by other powers. The United States, by unilateral treaty interpretation, is not the legal arbiter of the world. From the outset, therefore, the Stimson Doctrine was political, not legal, and its efficacy could reside only in the political threat of non-recognition, not in any truly judicial decision.

The emergence of the doctrine, however, is evidence of the growing sense of "constitutionalism" in international affairs, a sense that some

[5] *Unity*, 13 January, 1930.

[6] Dept. of State, Press Release, 9 January, 1932, p. 14. The American practice of non-recognition of governments which had come into control by means considered undesirable by the United States of course constituted some precedent for the Stimson Doctrine (see page 71,) but this previous policy was applied to governments within states, not to the results of treaty infringing activities between states.

treaties are basic and that operations in violation of their provisions should "not be recognized" by other members of the community. Owing to the lack of any judicial organization to pass judgement in legal fashion, the task of making a decision was undertaken by a government which led the way in a policy of social ostracism. Between such a course and a truly legal judgment by authorized agencies to the effect that a person is an "outlaw" or that an engagement is void, there is a tremendous difference. The Stimson Doctrine, political as it is, nevertheless may mark the first step along a road which will lead to a genuinely legal "nullity" sanction.

It was unfortunate, though, that a doctrine so significant and of such importance, should have been made to hang from a legal peg as nebulous as the Pact of Paris.[7] When there is such ground for controversy as exists over the meaning of "war as an instrument of national policy" and "pacific means," the application of the doctrine, that is, the determination as to whether measures taken are in violation of the Pact, becomes exceedingly difficult. Through the legal loopholes have marched whole regiments of Japanese to Mukden, to Jehol, and to Peiping.

It is beyond the scope of a volume on treaty sanctions to enter into detail into the Sino-Japanese controversy, the Colombia-Peru embroglio and the Paraguay-Bolivia disputes, and these will be discussed only in so far as they have a bearing upon the topic of the "non-recognition" doctrine as a sanction. In all these international crises, the Stimson Doctrine played a significant part, and was employed by both the United States and the League of Nations, serving as a common lever for prying into the questions at issue.

A little more than two months after Mr. Stimson had brought forth his "sanction," he was supported by a Resolution of the Assembly of the League of Nations which on 11 March, 1932 declared "that it is incumbent upon the members of the League of Nations not to recognize any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris."[8] By this action, non-recognition entered as a sanction for the League of Nations Covenant as well as for the Pact of Paris, and since almost all League members were signatories of the Pact, non-recognition under the latter by the United States furnished a

[7] See Wright, *The Meaning of the Pact of Paris*, *op. cit.*

[8] *Off. Jour.*, Special Supplement 101, Records of the Special Session of the Assembly, 1, 1932, p. 86.

method for the long desired collaboration between the League and the United States. There is a difference in the wording between Mr. Stimson's note and the Assembly resolution which merits attention. While the former declares that the United States "does not intend to recognize," the Assembly says, "it is incumbent upon the members . . . not to recognize." The latter is necessarily less positive since the Assembly cannot speak in binding fashion on behalf of governments, but as long as these latter in practise support the resolution, the difference in terminology is of minor consequence.

Both the United States and the members of the League of Nations were arrayed together in not recognizing any settlement in the Far East which they might consider as having been achieved by means contrary to the obligations of the Pact of Paris and the Covenant of the League which supported the status quo established by the Nine-Power Treaty of 1922.[9] Here was a case where the implied sanction of fundamental "constitutional" treaties like the Covenant and the Pact was employed to support the provisions of another treaty which set up a regime not to be altered except by "pacific means." The world's structure of status quo treaties was sanctioned by the interpretation which Mr. Stimson announced and the Assembly accepted of the terms of the Pact. The theoretical aspects of this situation are many, though the practical results today may be few. Carried to its logical conclusion the Stimson Doctrine means that the violator of any treaty in the future who attempts to alter the treaty provisions or to create a new situation by means contrary to the Pact and the Covenant is confronted by the sanction of non-recognition of the results of his activities. The Stimson Doctrine is not only a sanction for the Pact of Paris: it may be a sanction for numbers of treaties inasmuch as infringement of the Pact may involve infraction of any treaty establishing an international regime or situation. The Pact is basic, is constitutional and in theory raises a protecting umbrella for other treaties against any threatened or actual international inclemency. The difficulty, so far as the Stimson Doctrine is concerned to date, lies in the unreliability of the "umbrella" itself. There are legal holes galore where the meaning of "pacific" and "war" are concerned.[10] Mr. Stimson hitched his new doctrine to something very thin and very fragile. If it is not clear when and how the Pact is or can be violated, a sanction for such violation is not reliable.

[9] Malloy, III, p. 3120.

[10] Eagleton, *The Attempt to Define War*, Int. Conciliation, No. 291.

From the first it has been far from certain that Japan has violated the Pact of Paris. In reply to Mr. Stimson's January 7 note, the Japanese rather tartly observed that "it might be the subject of an academic doubt whether, in a given case, the impropriety of means necessarily and always avoids the ends secured, but as Japan has no intention of adopting improper means that question does not practically arise."[11] There is considerable leeway for doubt as to whether Japan has used "improper," that is, non-pacific, means. Though many authorities conclude that she has,[12] the word pacific is not accurately or legally defined in a fashion conclusive for international law, certain publicists insisting that "pacific" means any measure short of war.[13] As long as such divergence exists, any sanction to be applied after non-pacific measures have been used, must necessarily be an uncertain one. There was no resort to war in the Far East, so that the non-recognition sanction could not apply to Article 1, and even if there had been war, the Japanese could argue on the basis of "self-defense" as they actually did in regard to their actions, a contention which was not sustained by the Lytton Report[14] nor by the Assembly report.[15] As far as taking action in the Far Eastern crisis was concerned, Mr. Stimson might have found a more solid legal foundation for his stand on the basis of the Nine-Power treaty[16] in which the contracting Powers agreed "to respect the sovereignty" of China (Article 1) and in which they agreed "that, whenever a situation arises which in the opinion of any one of them involves the application of the stipulations of the present treaty . . . there shall be full and frank communication between the Contracting Powers concerned." (Article 7.) However, he chose not to do so, and the Stimson Doctrine emerged as a prop for a shaky treaty.

Not only is "non-recognition" as a sanction weakened by its association with a controversial Pact and later with a Covenant whose Article 12, which Japan most clearly appeared to have violated, stated that "all disputes likely to lead to a rupture" must be submitted to League or judicial or arbitral agencies—what is a dispute likely to lead to a rupture?[17] Was the Sino-Japanese dispute such a

[11] *New York Times*, 17 January, 1932.
[12] Wright, *Meaning of the Pact of Paris*, *op. cit.*
[13] G. G. Wilson, *op. cit.*
[14] Off. Doc., C 663.M320, 1932, VII. p. 71.
[15] Verdict of the League, *op. cit.*, p. 70.
[16] *Op. cit.*
[17] See Hindmarsh, *op. cit.*, p. 133.

one as long as diplomatic relations remained unimpaired?—but it also contains defects inherent in itself as a sanction. How effective is it, standing alone? The answers must vary, depending upon the importance of the non-recognizing power, or powers, upon the strength of the violating nation, and upon the stress which the latter attaches to recognition of the new situation established by it. Non-recognition is essentially a political, a diplomatic weapon,[18] and its force is therefore imponderable when considered in the abstract. Further, it should be pointed out that non-recognition in the actual case where the Pact and the Covenant have been alleged to have been infringed, applies not to the supposed violator state, Japan, but only to Manchukuo, the "state" sponsored (or was it "self-determination"?) by Japan. Non-recognition is used against the fruits of violation, not against the violator. This may not be a necessary part of the doctrine, which might in the future be used against the infracting state itself. To date, however, the world is treated with the anomalous picture of the nations maintaining direct and apparently cordial diplomatic relations with Japan, while officially ignoring its protegé for whose illegal birth Japan has been deemed responsible. In and of itself non-recognition can scarcely be considered an effective sanction and calls for supplementary measures to make it effective. This fact apparently has been recognized by the Assembly, for in its report in February 1933,[19] in which the doctrine of non-recognition was reaffirmed, it appointed an Advisory Committee "to aid the members in concerting their action." Non-recognition in itself was not enough; something more had to be done and the Advisory Committee of twenty-one, with American participation,[20] proceeded to draft various proposals to give potency to the doctrine. Non-recognition, unless a relatively weak and dependent power, unprotected by any major nation, is concerned, implies something further. The Japanese and Manchukuoans may well say, "What are you going to do about it?" Thus, taken by itself, non-recognition may amount to nothing more than the expression of a pious wish. Operating alone, it cannot readily secure the termination of the situation not recognized. All the eye-shutting and non-recognizing in the world do not remove the unpleasant object from the scene. Positive supplementary moves seem to be essential, the As-

[18] See page 71.
[19] *Op. cit.*, p. 84.
[20] Dept. of State, Press Releases, 18 March, 1933.

sembly Committee has had to consider sanctions of a more positive sort—boycotts and embargoes[21]—discussed elsewhere,[22] and many Americans have asked for economic sanctions to bolster the Pact and to put teeth into its obligations, whatever those may be. Furthermore, mild as non-recognition may be as a deterrent, it may prove a boomerang for the nations applying it, in that failure to have relations with a given area, such as Manchukuo, may prove exceedingly inconvenient, and in spite of the doctrine, no "non-recognizing" state has withdrawn its consuls from Manchuria.[23]

Theoretically, therefore, the Stimson Doctrine was of the highest significance; it was designed to strengthen the peace structure of the world, it furnished grounds for United States cooperation with the League and it was another evidence of the sense of "constitutionalism" and of American responsibility for world order. Practically, however, its results, when appraised, do not lead to very optimistic conclusions. To be effective, non-recognition needs machinery behind it to apply it, that is, more drastic sanctions are required to give it vigor. Without implementation, with no mechanism of application, with no threat of further measures and without the cooperation of a great group of powers it is a puny sanction indeed. Sanctions of nullity in the domestic area are backed by a well organized judicial administrative system and unless such supplementary apparatus is provided in the international community, non-recognition must remain important in theory but ineffective in practise. Consultation and other sanctions of a more positive and cooperative order are essential sequels, at least where a strong power is concerned. The Stimson Doctrine was invoked in the Leticia dispute[24] and in the Paraguay-Bolivia affair,[25] and in such instances where relatively minor powers were concerned, the doctrine might have produced concrete results.[26] In the Declaration of the American Republics, 3 August, 1932, the Stimson Doctrine was definitely proclaimed: "The American nations further declare that they will not recognize any territorial arrangement of this controversy (Paraguay-Bolivia) which has not been obtained by peaceful

[21] *New York Herald Tribune*, 3 June, 1933.

[22] See page 151.

[23] *New York Herald Tribune, op. cit.*

[24] Verdict of the League, Columbia and Peru at Leticia, W.P.F. Pamphlet, 1933.

[25] Dept. of States, Press Releases, 6 August, 1932.

[26] For the opinion that the threat of non-recognition or of more drastic sanctions had no effect upon the settlement of the Leticia case, see J. B. Moore, "An Appeal to Reason," *Foreign Affairs*, July, 1933.

means,"[27] but the question ever arises, "what are 'peaceful means,'" and the Paraguay-Bolivia fighting in the Chaco still continues.[28] The Doctrine was suggested by Mr. Stimson as a sanction in the Leticia controversy in his note to Peru of 25 January, 1933,[29] but the dispute was settled[30] without any further steps in that direction, though non-recognition was referred to also by the Council in its resolution of March 18, 1932.[31] This resolution like that of the Assembly in the Manchurian case called for a committee to "concert action." Non-recognition requires concerted action and it also seems to demand subsidiary sanctions, joint coercive economic or military measures to put vitality into its threat.

The actual announcement of the Stimson Doctrine and its employment in the Manchurian crisis evoked considerable criticism.[32] The doctrine was conceived as a sanction promoting order and upholding the status quo of the world against violent change, but issued unilaterally by one government in a world in which no status quo is necessarily sacred and in which processes of revision except by force are not clearly elaborated,[33] it may lead to more confusion than if it had never been promulgated.[34] If the Japanese go ahead in northern China and if the infant state of Manchukuo continues to thrive as lustily as it has to date, despite the stamp of "illegitimacy" upon its origin, the western powers may well look a bit ridiculous in their efforts to ignore what cannot be ignored. The United States and the members of the League are in the awkward dilemma of either retracting what they solemnly said about not recognizing or else they must take positive action to give effect to their words, unless the present situation is allowed to continue indefinitely or unless the Japanese finally agree to propositions akin to those contained in the Lytton Report's recommendations. Perhaps some graceful formula will be found, but even if such an event does happen, the doctrine has led to embarrassing difficulties when realities in Manchuria ran ahead of well-meant but dubious doctrines. Perhaps Mr. Stimson had no

[27] *Ibid.*

[28] February, 1934.

[29] Dept. of State, Press Release, 28 January, 1933.

[30] *New York Times*, 26 May, 1933.

[31] Doc. C201 M98, 1933, VII.

[32] See A. L. Lowell, "Manchuria, The League, and The United States" in *Foreign Affairs*, April, 1932.

[33] See page 18.

[34] Lowell, *op. cit.*

choice but to issue such a note as he did on 7 January, 1932,[35] but it seems that by acting under the Nine-Power Treaty he might have done better. The Japanese naturally protested against a doctrine of which they were unaware when they signed the Pact,[36] though one authority holds that non-recognition is a fair implication from the treaty and that the Japanese ought to have known of it from the beginning.[37] Whatever the merits of Mr. Stimson's action and of the controversy as to his fairness to Japan, and no matter what the results of the Manchurian case will be eventually, it seems clear that non-recognition is not a satisfactory sanction at the present. By itself it is virtually impotent, and it seems to require the support of more powerful additional sanctions than the nations are yet willing to give it. "Non-recognition" implies a more highly organized community than now exists, a community in which courts and coercive measures are well established to apply the doctrine in legal fashion. Such a time may never come, but unless it does, non-recognition, which should be a legal doctrine but which, due to the absence of a sufficiently well ordered international government, has been mainly political, may remain a disturbing and confusing, rather than a clarifying factor in international relations.

A proposed nullity sanction which would have a mechanism of application behind it has been suggested by M. Cornejo (Peru) who has proposed an additional paragraph to Article 18 of the Covenant of the League of Nations:[38]

> The Secretariat of the League of Nations may not register any treaty of peace imposed by force as a consequence of a war undertaken in violation of the Pact of Paris. The League of Nations shall consider null and void any stipulations which it may contain, and shall render every assistance in restoring the status quo destroyed by force.[39]

This nullity provision would be a sanction for the Pact of Paris in addition to those of the preamble, of consultation, of public opinion, and the Stimson Doctrine. Though its addition to the Covenant might

[35] Mr. Walter Lippmann strongly supports this view, *New York Herald Tribune*, 12 January, 1933.

[36] I. Mitobe "Japan and the Peace Pact," Radio Broadcast, 20 August, 1932.

[37] Wright, *Meaning of the Pact of Paris*, *op. cit.*

[38] See page 7 for discussion of plans to amplify Article 18 as evidence of "constitutionalism."

[39] This was laid before the Council, 14 January, 1930, *Off. Jour.*, 1930, 78, and considered by the Committee for the Amendment to the Covenant of the League of Nations in order to bring it into harmony with the Pact of Paris, 4 March, 1930. Minutes of Comm., L. of N. Doc. C 160. M69, 1930, v, 81. It was rejected by the committee.

jeopardize the function of the League treaty registration division,[40] it would constitute a sanction definitely backed by the League of Nations which would be bound to "render every assistance in restoring the status quo destroyed by force"; it would be implemented in a way that would give it far greater effectiveness than a simple statement about nullity, unsupported by a central agency to insure enforcement of the provisions.

Article 18[41] of the Covenant as it now stands contains a possible sanction in the wording of the final sentence: "no such treaty shall be binding until so registered." Up to the present, except for the 1920 military agreement between France and Belgium,[42] this sanction has not been a matter of international concern; the League Secretariat has gone about its job of treaty registration in a ministerial fashion, without questioning the validity of the agreement it receives,[43] and no real question concerning the full purport of the article has arisen. Undoubtedly the signatories to a non-registered treaty would certainly consider the agreement binding as between themselves, as did France and Belgium in the incident cited, but third states would not be bound thereby, and therein lies the sanction. Third states might consider such a secret convention as though it were no convention at all, so far as they were concerned, and with the League machinery always at hand, the sanction might be of considerable effect, though again, as with military conventions, if the parties signatory deem it binding and act according to its terms, nullity of the agreement from the outside point of view would be of small importance. The signatories might well afford to feel indifferent unless the treaty directly involved the necessity of its recognition by third powers.

A treaty statement to the effect that any act counter to the treaty is null and void is almost valueless as a sanction unless there exists some sort of an international organization to enforce the statement. The possibility that an injured party could rightfully consider an action counter to a treaty as illegal would prove but a slight deterrent to a possible violator of some strength, unless there existed international machinery, analogous to that existing inside the state, capable of

[40] See Hudson, "Registration of Treaties," *Am. J. Int. Law.*, XXIV, 752–757.

[41] "Every treaty or international engagement entered into hereafter by any member of the League shall be forthwith registered with the Secretariat, and shall as soon as possible be published by it. No such treaty shall be binding until so registered."

[42] L. of N. Treaty Series 56; Records of the Second Assembly, Plenary Meetings, 704, 839, 848.

[43] Hudson, *op. cit.*

making the violator give up his wrongful gains or retract whatever he had done counter to the agreement.

Treatment of this nullity sanction terminates the analysis of one large type of treaty sanction, namely that which operates in the main upon the whole state, or the sovereign or representative of the state. States in their corporate capacity are not alone involved in the matter of treaty observance and violation. Many treaties, particularly in recent years, pertain to and directly affect the affairs of private individuals, and the subject of treaty sanctions must include them as well as the states to which they belong.

## PART B

### WHERE PRIVATE INDIVIDUALS ARE CONFRONTED BY A SANCTION

From earliest times it has been customary for states in the drafting of treaties to take into account the fact that private individuals may violate the treaty terms, and to take steps to prevent infringement on the part of such private persons. Except for purely political conversations such as those relating to alliances and guarantees, most inter-state agreements involve the cooperation and need for observance by private citizens and subjects, and these latter must be induced in some fashion to conform to their state's international obligations. Treaties of commerce, tariff, smuggling, navigation, copyright, etc., in particular deal with matters where individuals are very much concerned, and a sanction for their conduct has been provided in treaties from the days of ancient Greece to modern times. As world commerce and trade developed, as the need for closer international cooperation increased, treaties and conventions relating to commerce, business, and private relations grew in number, the proportion of strictly political international agreements thereby decreasing. The importance of a sanction for individuals has thus become increasingly greater as the necessity for international regulation of private relations and business intercourse has become clearer. Nineteenth and twentieth century treaties are replete with sanctions upon the individual's conduct, though the relative number of such sanctions has been growing steadily since the Reformation.

In general, two methods have been employed in sanctioning treaties in regard to private persons, (a) through enforcement of the agreement by each signatory through its courts and administrative agencies, placing the treaty somewhat in the category of municipal

law, and (b) through enforcement by international agencies. This second method is of relatively very recent origin, and involves consideration to a large extent of "implementation," a topic discussed in the next chapter.

The first method is familiar to Americans because the United States Constitution very definitely makes treaties the law of the land,[1] thus bringing all questions of treaty violation by private persons in this country automatically before the courts. In many times past, other states have not gone so far toward incorporating treaties into domestic law, but have inserted provisions in their agreements by which they oblige themselves to punish individuals who are violators, and to regard certain portions of the treaty as being in certain respects like municipal law.

This practise dates back to ancient times. A treaty between Hierapytna and Priansos (date unknown)[2] stated that if any individual contravened the part of the convention relating to import duties, he should be liable to a fine imposed by the authorities of whichever contracting city he happened to be in when apprehended. A treaty between Athens, Thebes, Chios, and Mitylene (378 B.C.)[3] read in part: "If a citizen, magistrate, or subject proposes any measure contrary to the tenor of this treaty, he shall be deprived of his rights, and his goods shall be confiscated," and in a treaty between Rhodes and Hierapytna (approx. 300 B.C.)[4] is found the provision that "no Rhodian shall ever carry arms against a citizen of Hierapytna under penalty of being subject to the same punishment as if he had carried arms against his native city of Rhodes." The sanction in such instances as these and in the others to be considered is not automatic for it depends upon the willingness of local authorities to take part in making it effective, but none the less it is a strong sanction for an individual to know that if he violates a treaty entered into by his state, he is liable to the same punishment as if he had committed a crime against domestic law.

Art. 5 of the treaty of 561 A.D.[5] between Cosroe of Persia and Justinian provided that the merchants of the respective signatories must travel by certain trade routes, and that if they took other roads, they were to be subject to a heavy fine. From the date of this treaty to the

[1] Art. VI.
[2] Egger, *op. cit.*, 79; Barbeyrac, I, 282.
[3] Egger, 84.
[4] *Ibid.*, 297.
[5] Barbeyrac, II, 197.

14th century almost no treaty sanctions against individuals have been found; not many early medieval interstate agreements related to trade; political alliances and truces virtually monopolized the subject matter of interstate conventions, and furthermore, the contracting rulers and heads of "states" were not in a favorable position to enforce penalties against individual violators—centralized authority and responsibility were a long way from full development.

A treaty (9 Dec., 1315)[6] between Uri, Schweitz, and Untervalden marks a rebeginning of the sanction concerning individual citizens. Commercial arrangements between England and Portugal were made in 1353 when a treaty was signed[7] by which both parties agreed that their respective merchants should not injure the persons or property of the other, and that penalties should be applied against any merchant violating this agreement. From that date henceforth the number of references to penalties and punishments for infringement by private parties became more and more frequent.[8]

In the treaty of Munster, 24 Oct., 1648[9] between the Holy Roman Empire and France, and the treaty of Osnabruck of the same date between the Empire and Sweden[10] a significant article was inserted to the effect that[11] "for the more validity of all these articles, this treaty shall henceforth be looked upon as a perpetual law of the Empire." For the private citizenry of the Empire the treaty thus became a part of domestic law, and was given the backing of the coercive power of the state. Treaty and domestic law sanctions were definitely united. Article LXIX of the Munster agreement went on to make this result explicit: "All persons whatsoever who shall infringe any of these articles are to incur the penalties due to such as break the public peace and are to be obliged to make reparation for any injury done."

In treaties subsequent to the Westphalia agreements, references to individual violation became quite common. Article VII of the treaty between England and Holland (5 April, 1654)[12] for example, stipu-

[6] Dumont, I, II, 29; "Si quelqu'un entreprenait de vouloir . . . rompre ou transgresser ces choses ici escriptes un tel sera tenu pour desloyal et parjure et sera son corps et son bien confisque audict pays."

[7] *Ibid.*, 286.

[8] E.g. See treaties between Louis XI of France and the Count of Charleroi, (5 October, 1465), Dumont III, I, 335; Edward IV of England and the Duke of Britanny, (30 September, 1471), *ibid.*, 437; Emperor Maximilian and Flanders, (16 May, 1488), *ibid.*, III, II, 201; Poland and Sweden, (1629), *ibid.*, V, II, 594.

[9] Horsley, 18.

[10] *Ibid.*

[11] Art. LXVIII of the Munster Treaty; Art. XVII of the Osnabruck agreement.

[12] Horsley, 150.

lated that "neither republic shall aid or harbor rebels to the other, and that subjects of either republics aiding or assisting the rebels with arms shall be deemed guilty of high treason against the state wherein they are found guilty." A practice further developed whereby it was stated that individual contraveners of a treaty's terms should be punished, but that such conduct on the part of private persons should not operate to invalidate the agreement as between the states signatory. For example, Article XIII of the Anglo-Swedish treaty, 11 April, 1654[13] declared: "The contraveners of either side shall not be the means of dissolving the treaty; the individuals only who are guilty shall be punished." Similar provisions were placed in many treaties during later centuries[14] and to several of these the United States was a party.[15]

It was in treaties of commerce, however, that sanctions against individuals came to be of importance. As in the Anglo-Portuguese agreement of 1353,[16] the concern was to assure the safety of merchants, and to give greater security for the carrying on of trade. The treaties imposing penalties upon those harming foreign traders reflect the growing demand of the times for the protection of business and commercial relations. Efforts to curb and regulate privateering were also a part of this tendency to facilitate commerce and free international trade from arbitrary violence and interference. Such articles as the following from the Anglo-Dutch commercial convention of 17 Feb., 1668 are typical of many that followed in later agreements:[17]

Art. XIX: The captains and masters of English ships shall be charged to offer no injury to those of the United Provinces, and if any do, they shall be punished and make reparation.

Art. XIII: Commanders of privateers shall give security to answer the injuries done by them at sea.[18]

Somewhat similar provisions went into the United States treaty of

[13] *Ibid.*

[14] E.g. England and France, (3 November, 1655), *ibid.*, 78; Eng. and Denmark, (1661), *ibid.*, 144; England and France, (20 September, 1697), (Reswick) *ibid.*, 253; Gr. Britain and France, (11 April, 1713) (Utrecht) *ibid.*, 383; Gr. Britain and Morocco, (14 June, 1801), DeMartens, *Nouv. Rec.*, II, 103.

[15] U. S. and Brazil, DeMartens, *Nouv. Rec.*, IX, 54; U. S. and Mexico, *ibid.*, X, 322; Chile, *ibid.*, XI, 438.

[16] Dumont I, 2, 64.

[17] E.g. Anglo-French Convention, (23 February, 1677), Horsley, 182; Gr. Britain and France, (11 April, 1713), (Utrecht), *ibid.*, 383.

[18] Horsley, 163.

friendship and commerce with Holland, 8 Oct., 1782,[19] and are found in other commercial treaties of the day.[20]

In the 19th century individuals as such become of more and more significance in international affairs and there is a corresponding increase in the number of penalties and sanction provisions in treaties which concern private persons. Treaties came to be made on more and more topics—navigation, patents, fisheries, telegraph, slave trade, arms traffic, labor conditions, etc.[21] and conventions on certain of these subjects must be considered separately.

*1. Slave Trade*

Great Britain, early in the 19th century, took the lead in the attempt to suppress traffic in slaves, and concluded conventions with numerous countries by which both parties condemned the traffic, and to make the condemnation effective, agreed to prohibit such trade by municipal legislation, and further arranged for the establishment of mixed tribunals to judge individual vessels which operated contrary to the treaty terms.[22] Here is seen a combination of the two sorts of sanctions mentioned at the beginning of the chapter, namely the sanction of municipal law enforcement and the sanction of some sort of international supervision and regulation. The mixed tribunals provided for by these treaties marked an important development in treaty enforcement; not only were the States themselves bound to carry out the treaty terms against their own subjects, but a supplementary international agency was established to render more effective the treaty provisions. By these conventions, furthermore, both parties allowed the naval vessels of the other to visit suspect ships[23] belonging to their respective nationals.

[19] DeMartens, *Rec.*, Vol. II.

[20] E.g. Turkey and Russia, (21 June, 1763), *ibid.;* Spain and France, (24 December, 1786), *ibid.;* Gr. Br. and France, (26 September, 1786), *ibid.;* Denmark and Geneva, (1789), *ibid.*

[21] See Hershey, *op. cit.*, 91–93.

[22] Gr. Britain and Holland, (13 August, 1814), DeMartens, *Nouv. Rec.*, II, 57; Gr. Britain and Spain, (23 September, 1817), *ibid.*, III, 133: Gr. Britain and Portugal, (28 July, 1817), *ibid.*, IV, 438.

[23] E.g. Gr. Brit. and Norway-Sweden, (25 January, 1825), *ibid.*, VI, II, 618, Art. II: "In order more completely to prevent all infringement of the spirit of the preceding article the two high contracting parties declare that the vessels belonging to their respective subjects which . . . may be found employed in this forbidden traffic shall by that act lose all right to claim protection of their flag; and they mutually consent that the ships of their royal navies . . . shall visit such merchant vessels." See also treaty between Gr. Brit., Austria, Russia, and Prussia, (20 December, 1841), DeMartens, *Nouv. Rec. Gén.*, I, 508, Art. I.

Far more elaborate and detailed provisions were placed in the treaty of 3 July, 1842,[24] between Great Britain and Portugal. Precise and definite penalties for the violation of the convention were provided for, and an individual contemplating engaging in the slave trade, counter to the treaty, was faced with a formidable array of punishments.[25] A new high point in the development of treaty sanctions was set by this convention which took on the aspect of a law regulating an international situation in a manner similar to a piece of municipal legislation for internal affairs.[26]

The bi-lateral method of slave trade regulation was superseded by the Anti-slavery Convention, signed by a number of states at Brussels, 2 July, 1890.[27] By Article V each signatory agreed to press for more legislation punishing those engaged in the slave traffic. Art. LVII–LXI provided for the suppression of the traffic by warships of the signatory powers and declared that the tribunal of the nation to whom the offending ship belonged, or the consul of that nation should adjudicate cases arising under the convention.[28] An International Bureau to be made up of one delegate from each signatory and to act as a clearing house for documents and information concerning the slave trade was established by Article LXXIV.[29] Sanctions of real force were thus put behind the treaty terms: foreign

[24] *Ibid.*, III, 245.

[25] Art. 10: "If any of the things specified in the preceding article shall be found in any vessel which is detained under the stipulation of this treaty . . . no compensation for losses, damages, expenses shall in any case be granted either to her master or to her owners or to any other persons interested in her equipment or lading, even though the mixed tribunal should not pronounce any sentence of condemnation in consequence of her detention."

Art. 5: "If the equipment or character of the vessel shall justify . . . detention under the stipulations of the present treaty or if any of the regulations specified in this article shall be unobserved or violated . . . then her master, and her crew, and her owner or owners of the vessel, of the cargo, or of the slaves shall be liable to be proceeded against as accomplices in an infraction of the present treaty, and to be punished accordingly, and the vessel and cargo shall be adjudged and condemned, and the slaves liberated." There is a further provision relating to piracy to be discussed later.

[26] Anglo-American Slave Trade Treaty, 7 April, 1862, (DeMartens, *Nouv. Rec.*, XVII, I, 259) Art. 5. "In case the commanding officer of any of the ships of the navies of either country . . . shall deviate in any respect from the stipulations of the said treaty . . . the government which shall conceive itself to be wronged, thereby shall be entitled to demand reparation, and the government of the offending officer binds itself . . . to inflict on the said officer a punishment proportional to any wilfull transgression which he may be proved to have committed."

[27] DeMartens, *Nouv. Rec. Gén.*, 2 me. Série, XVI, 3.

[28] *Ibid.*

[29] *Ibid.*

warships were to act as police agents and definite tribunals for penalty and punishment were agreed upon internationally.[30] These anti-slavery conventions are not held, however, to make the slave trade strictly illegal from the point of view of international law.[31] The treaty sanctions are sanctions of the treaty only, and not of any rule of international law.

*2. River and Lake Navigation and Communications*

Regulation of river and waterway traffic concerns individuals very directly and the conventions on this topic which have been made during the last century contain very definite penalties to be applied to private persons violating the articles of the convention. One of the first of these agreements[32] was that between Portugal and Spain, 23 May, 1840,[33] for the navigation of the river Douro, Art. 41 of which specified the fines and penalties to which individual violators are to be subject. Exaction of the penalties was to be made through the municipal courts of the respective signatories. Articles 15–17 of the Treaty of Paris, 1856,[34] applied the principle of the Vienna Act to the Danube, and Chapter VI, Art. 98–103 of the convention between the Great Powers and Turkey, 21 Nov., 1864[35] contained a list of the penalties to be enforced by the respective parties against persons infringing upon the regulations for the lower Danube. The Danube Convention of 1883[36] went much further: Art. 72, for example, stated that "every violation of Article 18 is to be punished by a fine of from 50 to 100 francs" and sub-inspectors of navigation and captains of the various ports were to pronounce sentence in the first instance, with appeal to the new International Mixed Claims Commission which was established[37] to supervise the execution of the regulations. Similar pro-

[30] Another slavery convention to which 20 states were parties was approved by the League of Nations Assembly in 1926. L. of N. Yearbook, No. 7, 198.

[31] Hershey, *op. cit.*, 336, though Fanchille, *op. cit.*, I. 398, does state that international law condemns domestic slavery.

[32] The Final Act of the Congress of Vienna (DeMartens, *Nouv. Rec.*, II, 379) in Art. 109 declared that "navigation on the (Rhine, Scheldt, Main, Moselle, Meuse) . . . shall be entirely free, and cannot in respect to commerce be prohibited to anyone; it is understood, however, that respect will be paid to police regulations. These regulations shall be uniform to all." Definite fines and penalties were not specified in the treaty.

[33] DeMartens, *Nouv. Rec. Gén.*, I, 98.

[34] DeMartens, Cussy, V, 497.

[35] DeMartens, *Nouv. Rec. Gén.*, XVIII, 119.

[36] *Ibid.*, 2 me. Série, IX, 392.

[37] *Ibid.*, Art. 72–86.

visions had appeared in the Rhine navigation convention of 1868,[38] and the River Pruth Convention of 1871.[39]

In the Lake Constance Navigation Convention, 22 Sept., 1867[40] and the Franco-Swiss Convention, 9 July, 1887[41] for the regulation of traffic on Lake Geneva strict penalties likewise were inserted, to be put into effect by the courts of the state within whose jurisdiction the infraction took place.[42] All these treaty provisions are indicative of the growing tendency to regulate international commerce. Municipal criminal jurisdiction was extended by treaty to cover the violations committed by individuals of international conventional rules, and in some cases as in the 1883 Danube treaty, the convention was implemented by the setting up of an international commission to carry out the convention's terms.

The Treaty of Versailles, Art. 331–364[43] internationalized several rivers of Europe and set up various river commissions, but no penalties applicable to individuals were placed in the text. In 1921, a new Danube convention was signed[44] which made permanent the International Commission,[45] and provided that the commission should elaborate navigation and police regulations which the signatory states were to incorporate into their domestic law and to enforce by their own police agencies,[46] subject always to the supervision of the international commission. Direct treaty penalties like those of the 1883 convention were thus omitted. Similarly the various conventions signed at Barcelona in 1921, relating to Freedom of Transit, Railways, Maritime Ports, Transit of Electrical Energy, Hydraulic Power, and Navigable Waterways[47] provide for enforcement of regulations through local state authorities, though setting up various commissions to draw up the rules required.[48]

The international convention on Submarine Cables, 14 March,

[38] *Ibid.*, *Nouv. Rec. Gen.*, XX, 355, Art. 33–43.
[39] *Ibid.*, 2 me. Série, I, 495.
[40] *Ibid.*, *Nouv. Rec. Gén.*, XX, 117, Art. 24.
[41] *Ibid.*, 2 me. Série, XIV, 357.
[42] *Ibid.*, Art. 80 "Les contraventions au présent reglement sont punies dans les eaux Suisses d'une amende de 2 francs à 1,000 francs ou d'un emprisonment de un jour à 2 mois, sans préjudice des peines plus graves pronouncées par des tribuneaux en cas crimes ou délits. Dans les eaux françaises elles sont soumises à la législation en vigueur."
[43] *Ibid.*, 2 me. Série, XI, 323.
[44] LeFur and Chklaver, *Rec. de Textes de Droit Int. Public*, 1928, 524.
[45] Art. 7.
[46] Art. 24–26.
[47] LeFur and Chklaver, *supra*, 548.
[48] E.g. Art. 14 of the Navigable Waterways Convention, *ibid.*, 590.

1884[49] stated that any infraction of the convention would be dealt with by the courts of the state upon whose vessel the violation occurred, and in Art. XII stated that the high contracting parties agreed to propose to their respective legislatures the measures necessary to secure the execution of the convention and to punish by imprisonment or fine any person contravening the articles of the agreement. In the Radiotelegraphy Convention, 3 Nov., 1906,[50] vessels violating the agreement were to be penalized by not having their messages accepted by coastal stations of a state which had declared the vessel to be at fault; and land stations infringing upon the treaty terms were to be deprived of their licenses and certificates by their respective governments.[51]

The Aerial Navigation Convention signed at Paris in 1919[52] stipulated that in addition to undergoing the penalties prescribed by the laws of a state which had suffered an injury from a violation of the terms of the convention, an aviator contravening the terms should be deprived of his license by his home state.[53]

There is thus in most of these conventions on navigation, transportation and communication some provision in regard to infraction by private persons. In some of these agreements, notably in the 1883 Danube treaty, penalties are specifically stated, while in others it is left to signatories to enact their own police regulations. In either case individuals are confronted either by treaty sanctions or municipal sanctions enacted in support of the convention authorizing them.

*3. Treaties with China.*

In some of the treaties which the western Powers have concluded with China, strong penalties have been included to apply against individual contraveners of the accords. The special conditions relative to the Chinese situation have necessitated elaborate and detailed rules concerning the relations between merchants and citizens of the occidental nations and those of China. A Sino-British convention of 1843[54] contained several penalty articles but the commercial agreement of 1845[55] between the United States and China included many more:

[49] DeMartens, *Nouv. Rec. Gen.*, 2 me. Série, XI, 281.
[50] DeMartens, *ibid.*, 3 me. Série, 147.
[51] Art. VII.
[52] DeMartens, *ibid.*, XIII, 61.
[53] Art. 16.
[54] DeMartens, Cussy, V, 363.
[55] *Ibid.*, VI, 25.

Art. 3: (U. S. vessels may go to five Chinese ports only) and any vessel belonging to a citizen of the United States which violates this provision, shall with her cargo, be subject to confiscation by the Chinese government.

Art. 9: (Concerning unloading with a permit.) And the master, supercargo for consignee if he proceed to discharge the cargo without such permit shall incur a fine of $500 and the goods so discharged shall be subject to forfeiture to the Chinese government.

Art. 22: Nor shall said flag (U. S.) be fraudently used to enable the enemy's ships . . . to enter the ports of China; but all such vessels so offending shall be subject to forfeiture and confiscation by the Chinese government.

The treaty between France and China of 1858[56] contained analogous provisions in many respects. Where complicated and important commercial and business relationships are involved, it is therefore not surprising that conventions with strict regulatory provisions should have been made.[57]

### *4. Fisheries*

The fishing industry, engaged in as it is by practically all maritime nations and in which the claims of various states on behalf of their fisher-folk easily came into conflict, urgently required some sort of international regulation, especially in sea areas where fishermen of many countries had long been accustomed to carry on their trade. In answer to the need for international agreement, the North Sea Fisheries Convention was signed, 6 May, 1882, by Germany, Great Britain, Denmark, France, Belgium and the Netherlands.[58] This convention was very interestingly implemented by provisions to the effect that the naval vessels of the signatory powers were to see to the execution and supervision of the convention's stipulation.[59] It was provided that the warships of all the contracting parties were to be competent to decide upon all violations of the rules prescribed by the treaty.[60] The procedure was outlined: cruisers were authorized to demand official paper testifying to the nationality of the fishing vessel's owner. In case of a violation of the convention, the warship's captain was to draw up a procès-verbal as to the facts in the case, to be turned over to the authorities of the state of the owner. That was to be all if the warship and the fisherman were of different nationalities. However, in grave cases, the war vessel might take the fishing boat to

[56] De Martens, Nouveau Rec. Gen. XVII, 1, 2.
[57] See also U. S.-China Treaty, 8 October, 1903, *ibid.*, 2 me. Série XXXI, 587, Article 4.
[58] *Ibid.*, *Nouv. Rec.*, 2 me. Série, XX, 556.
[59] Article 26.
[60] Articles 28–35.

a port of the latter's own country.[61] Resistance against the naval vessel was to be considered the same as resistance to the national authority of the fisherman's own state. The cruisers also were empowered to conciliate certain disputes and settle damages, at sea.

Both kinds of sanction mentioned at the beginning of the chapter, that is, penalty by domestic courts and penalty by an international agency were arranged for by this convention. The naval vessels of all the parties, as regards fisheries were to be considered as agencies of the law of each of the signatories. National jurisdiction was extended and merged with that of the other contractants to form an international police jurisdiction in the matter concerned. The sanctions of the regulations of the convention for the individual fishermen consisted in the threat of punishment either by their home states or by the cruisers of any and all of the contracting powers.

The principle of allowing naval vessels of the signatory states to act in a police capacity in enforcing the convention was followed in subsequent agreements between other nations.[62] It was adopted by the parties to the convention of 7 July, 1911 relating to seals,[63] Article I, of which reads:

> The High Contracting Parties . . . agree that their citizens and subjects . . . and their vessels shall be prohibited while this convention remains in force from engaging in pelagic sealing in the waters of the North Pacific Ocean . . . and that every person and every vessel offending against such prohibition may be seized except within the territorial jurisdiction of one of the other powers, and detained by the naval or other duly commissioned officers of any of the parties to this convention, to be delivered as soon as practicable to an authorized officer of their own nation at the nearest point to the place of seizure. (The authorities in that place alone have jurisdiction) to try the offense and impose the penalties for the same.

The Anglo-American halibut treaty, 2 March, 1923[64] contained an article similar to the above, in regard to violations of the convention's regulations of halibut fishing in the Behring Sea. Fisheries conventions of the last 50 or 60 years have thus been heavily implemented by international police agencies, purely national enforcement not being adequate to meet the situation.

[61] A Franco-Swiss fishing convention, 28 December, 1880, *ibid.*, 111, stipulated that the courts of the respective parties were to handle infractions of the convention, and an Anglo-French agreement, 11 November, 1867, *ibid.*, XII, II, 465, had provided for enforcement by naval cruisers of the two powers.

[62] E.g. France and Spain, 18 February, 1886. *ibid.*, XII, I, 687; Great Britain and France, 26 April, 1884, *ibid.*, 756.

[63] U. S., Great Britain, Japan and Russia, *ibid.*, 3 me Série, 720.

[64] *Ibid.*, XIV, 62.

*5. Protection of Literary and Artistic Works*

Treaties on the subject of the protection of literary and artistic works have also contained penalty clauses relating to violation by individuals.[65] The 1883 convention between Germany and Belgium, for example, declared in Article 13 that every violation of the treaty stipulations concerning the protection of the other signatory's private literary works should entail seizure, confiscation and in general the same penalties as if the infraction had been committed to the prejudice of a work or production of domestic origin.[66] Essentially the same provisions are found in other bilateral conventions on this matter.[67] Imposition of the penalties authorized was left to the respective municipal courts, as was the case with the multilateral convention signed at Berne in 1886 and revised at Berlin in 1908.[68] The Berne convention established an "international bureau for the protection of literary and artistic works," but this body was given no coercive power, being designed mainly to serve as a clearing house for information.[69]

*6. International "Police Power" Conventions*[70]

Within the last 50 years there has grown up a large body of international conventions dealing with subjects which, in American law, would be considered as matters of "police"—health, protection of labor, liquor, arms, and white slave traffic. Growing international interdependence has necessitated some form of joint regulation of questions such as these which vitally affect the safety and welfare of every state. In the conventions on these topics, the nations have reciprocally agreed to apply their penal law in the enforcement of the treaty terms, have at times formulated severe and detailed penalties

[65] One of the first of these treaties was between France and Sardinia, 28 August, 1843, DeMartens, Cussy, v, 340, Art. VII.

[66] DeMartens, *Nouv. Rec.*, 2 me. Série, x, 431.

[67] E.g. France and Saxony, 26 May, 1865, *ibid.*, *Nouv. Rec.*, XXX, 542; Ecuador and France, 9 May, 1898, *ibid.*, 2 me. Série, XXX, 180.

[68] LeFur and Chklaver, *op. cit.*, 117. This treaty was superseded by a new convention signed at Rome, 2 June, 1928 (*Le Droit d'Auteur*, 1928, 73). See also Convention for the Protection of Industrial Property, 6 November, 1925, (74 League of Nations Treaty Series, 289) and Inter-American Convention for Trade-Mark and Commercial Protection, 20 February, 1929 (Publication of the Conf. Texts).

[69] Articles 21–22 of the 1908 Convention.

[70] The slave trade, fisheries and navigation conventions previously discussed, though they might well come under this general heading, have been separately treated because of their outstanding individual importance.

in the conventions themselves and furthermore, frequently have granted to international agencies certain powers of enforcement, as in some of the slavery and fishing conventions already cited.

The convention for the abolition of the North Sea Liquor traffic 16 November, 1887[71] followed the procedure of the 1882 Fisheries convention[72] in regard to control by naval cruisers of infractions at sea. The contracting powers also pledged themselves to propose to their respective legislatures the necessary measures for the punishment of violators of the convention. In the Brussels Act of 1890[73] the signatories agreed to punish those infringing upon the provisions concerning the importation of alcoholic beverages in certain barred zones in Africa, and similar clauses went into the later conventions of 1899[74] and 1919.[75] Bureaux were set up by these treaties but their functions had nothing to do with enforcement against private citizens.

The same Brussels Act of 1890 contained like articles referring to arms importation in certain African regions and other conventions dealing with the arms traffic[76] have provisions calling for the revocation of licenses and application of penalties by the signatory states upon individual breakers of the convention's terms. Article 18 of the Act of Algeciras, for example, stated that in the event of infraction by an exporter or importer of arms, the said exporter or importer was to lose his license. Article 19 called for the confiscation of any goods whose introduction was attempted counter to the treaty, and article 20 outlined the fines and penalties to be laid by the courts or the respective states. Articles 11 to 21 of the St. Germain treaty of 1919 provided for the surveillance at sea of the arms traffic by the warships of the contracting powers. These vessels were authorized to search suspected ships and to notify the authorities of the state to which the violator ship belonged.

In 1900 was signed the convention for African Animal Protection[77] in which seven states agreed to propose to their colonial legislatures the measures necessary to enforce the convention and to punish those who might infringe upon it, and in 1902 a convention for the Protection

[71] DeMartens, *Nouv. Rec.*, 2 me Série, XIV, 540.
[72] See page 260.
[73] De Martens, *Nouv. Rec.*, 2 me Série, XVI, 3.
[74] 91 State Papers, 6.
[75] Malloy, *Treaties*, III, 3746.
[76] Algeciras, 1906. DeMartens, *Nouv. Rec.*, 2 me Série, XXXIV, 238; St. Germain 1919, *Nouv. Rec.*, 3 me Série, XIV, 25.
[77] DeMartens, *Nouv. Rec. Gen.*, 2 me Série, XXX, 430.

of Birds Useful to Agriculture was drawn up,[78] by article 2 of which all taking of the nests, eggs or young of the birds protected by the agreement was forbidden under penalty of fines or imprisonment to be authorized by the legislatures of the signatories.[79]

International health treaties likewise have contained penalty provisions. In the convention for the regulation of the measures to be taken for the prevention of the plague, signed at Venice in 1897,[80] article 32, for example, reads, "Every violation of article 8 is punishable by a fine of 30 Turkish pounds," and article 38: "Every other violation of the terms of the present regulations is punishable by a fine of from 50 to 100 Turkish pounds." Special agents in each nation signatory were to see to the enforcement of the convention and to bring violators to court, and general powers of supervision were conferred upon the Superior Health Council of Constantinople which had been formed in 1838. The Sanitary convention of 1903[81] also, prescribed the penalties to be imposed upon captains of ships violating the treaty regulations.[82]

In the White Slave Traffic convention of 1910,[83] as in the convention forbidding night work by women of 1906,[84] the parties contracted to enforce the penalties set up by the convention for infraction, by their own laws and courts. The White Slave Agreement went on, however, to make violation of the convention an extraditable offense, an interesting development, and also set up international commissions of inquiry to deal with reported infractions. These commissions were to keep in touch with the local judicial authorities of the various nations involved. The International Labor Conventions adopted at Washington in 1919[85] usually contained some such statement as the following: "The law of each country shall provide punishment for any violation of (these) provisions," and in the convention for the Suppression of Traffic in Obscene Publications, 1928,[86] the various parties agreed to enact laws to carry out the provisions of the convention and to punish the violators thereof.[87]

[78] *Ibid.*, 686.
[79] Article 10.
[80] DeMartens, *Nouv. Rec. Gén.*, 2 me Série, XXVII, 339.
[81] *Ibid.*, 3 me Série, I, 78.
[82] For later health treaties see Buell, *International Relations*, 276–280.
[83] DeMartens, *Nouv. Rec.*, 2 me Série, VII, 252.
[84] *Ibid.*, II, 690.
[85] *Ibid.*, XIX, 72 *et seq.*
[86] *Ibid.*, 135.
[87] Smuggling conventions also contain references to punishment for individual in-

The list of treaties referred to in this chapter by no means is exhaustive of the number of conventions containing sanctions for individuals violating treaty terms. It merely indicates, rather, the types of sanctions used and the wide range of their employment in all manner of international agreements. The most common method has been for the states party to a convention to agree to consider a treaty as domestic law, enforceable by municipal courts, and to pass enabling legislation in their respective countries so that the treaty sanctions will be the same as municipal law sanctions for the private individual. By this means domestic law has been extended to include treaties and treaty provisions have been given the support and backing of organized state authority so far as individuals are concerned. The chief weakness in the system lies in the possibility that a signatory either will not pass the supplementary legislation required to make the treaty penalties of any real effect.

The other method of applying sanctions against private persons has been by international agencies or instruments directly, as in the North Sea Fishery and Liquor conventions where war vessels were authorized to act as a sort of international police body and as agents of the collectivity of the signatory states. The officers of these warships were empowered to impose fines and penalties upon violators in certain cases at sea. In the case of enforcement by international means, it has been customary for the treaty to specify exactly what penalties shall be imposed while for the other type of sanction application, namely, that by municipal authorities, sometimes the precise penalties are enumerated which are to be carried out, and sometimes it is left entirely up to the state to enact whatever penal legislation it sees fit, in order to make effective the regulations of the convention.

Treaty sanctions for individuals have grown more and more numerous and of more and more importance with the increasing interdependence of states of the world, this interdependence resulting in a host of treaties which regulate matters of concern to all and which must contain sanctions to be of any real value. These treaties form a body of international "legislation" dealing mainly with business, commercial and social welfare matters, which supplement the inade-

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fraction. Article 14 of the U. S.-Mexican convention, for example, (23 December, 1925, DeMartens, *Nouv. Rec.*, 3 me Série, XVIII, 266) says: "The High Contracting Parties agree to enact and enforce such legislation as may be necessary to make effective the provisions of this convention with appropriate penalties for the violation thereof."

quate municipal regulation of these questions and extend it to the international arena. Though not enacted by any one sovereign body, these treaties are similar to "legislation" in that they contain penalties like those of municipal law and also provisions for enforcement by one means or another. The situation is one part way between that of the isolated state unit and that of a superior, international law making organ: an international law or "regulation" is making itself felt upon the individual by means either of municipal authority or by more direct international agencies. Though enforcement, punishment and legislation by an international body are remote and perhaps forever impossible, the individual in the meantime is confronted by many and strong sanctions in his every day dealings.[88]

[88] One very special kind of treaty sanction has not yet been mentioned, namely that which calls for the treatment as a "pirate," of individuals infringing upon certain treaties. This sanction is found in some 17th century treaties such as that between England and France in 1686 (Horsley 227) where article 15 stated, "No subject of either king shall take commission or letters of mark from any prince at war with the other under penalty of being punished as a pirate" (presumably by either party), and also in several treaties of the U. S. during the 19th century such as the one with Columbia in 1825 (DeMartens, *Nouv. Rec.*, VI, II, 978) in which article 22 stipulated that "whereever one of the contracting parties shall be engaged in war with another state, no citizen of the other contracting party shall accept a commission or letter of marque with the said enemy against the said party so at war, under the pain of being treated as a pirate." This threat constituted an effective sanction for the articles in question if it were certain that such drastic punishment would have been meted out. The latest and most significant attempt to use this "pirate" sanction occurred in the Anti-Submarine treaty of the Washington Conference of 1922 (Buell, *The Washington Conference*, 394–397), Art. 3 of this treaty which never has gone into effect, reads: "The signatory powers desiring to insure the enforcement of the humane rules of existing law declared by them with respect to the attacks upon and seizure and destruction of merchant ships, further declare that any person in the service of any power who shall violate any of these rules, whether or not such person is under order of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for act of piracy and may be brought to trial before the civil or military authorities of any power within the jurisdiction of which he may be found." It appears doubtful whether this particular sanction will ever be of any practical importance; the submarine is too useful and important an instrument of modern naval warfare to be restricted in this fashion.

# CHAPTER V

## IMPLEMENTATION

By treaty sanction, as previously defined, is meant the threat of a certain measure or measures, either in the treaty itself or in international law, which induces conformity to and which tends to prevent the violation of a treaty. The violation may be passive in that a party simply fails to execute a treaty, or it may be more active and direct as when a contractant takes steps directly counter to a conventional obligation. For both these types of infringement the existence of governmental and international machinery constitutes a sanction; the presence of an executing agency makes the "passive" violation more unlikely, and further supplies a means whereby certain kinds of sanctions may be applied to bring the violator, whether passive or active, into line. The more certain the means of application, the more effective becomes the threat implicit in the sanction, and it is this problem of developing the means of application, of making the application more sure, which has come to the fore in recent years under the heading of "implementation." To implement means to add to, to strengthen, and to implement a treaty means essentially to strengthen its terms by including some provision for the handling of violations which may arise, by special bodies or organizations whose task is to deal with the execution of the treaty's terms and to take certain action in case of infringement.[1] Just as domestic legislation requires administrative and enforcing agencies to execute and penalize, so too, much of international treaty "legislation" is not self-executing and needs an administration to put its provisions into operation. To this administration is entrusted in many cases not only duties of execution but also those of enforcement and penalty application; the separate functions of execution and enforcement are often entrusted to the same implementing agency. Execution and enforcement are closely allied not only in that one officer, commission or body may perform both functions but also in that more effective execution makes for fewer possibilities of infraction. The administrative agent is ever at hand to bring attention to violation and to call into play a variety of sanctions, from critical public opinion to direct penal meas-

[1] See Shotwell, "Moves for Peace," *New York Times*, Section 3, 14 December, 1930. See page 197.

ures. Of the sanctions considered as of current utility, only the one defined as "loss of advantages and privileges" is automatic and requires no further steps to make it effective. The other sanctions, whether that of measures of force or the nullity sanction, need machinery and organization to make them of value. Sanctions are either automatic or else they call for measures of application, and it is "implementation" which furnishes the requisite mechanism to put the measures into operation.

The existence of such bodies and the possibility of action on their part constitutes a treaty sanction already discussed in part, under third party guarantee and mutual agreement to collaborate when violation occurs:[2] the League of Nations and the Permanent Court, serving somewhat in the capacity of the old third party guarantors, implement many of the peace treaties and other international agreements concluded since 1919. They are organizations which stand ready to handle questions of treaty infringement and the mere fact of their existence operates to deter would-be violators to some extent. The League of Nations of course is unique; it has taken the place to a large extent of the third party guarantee type of sanction, and has distinct coercive powers of its own, but many of the boards and commissions which implement international conventions and agreements do not have strong means at their disposal to bring pressure to bear, and involve sanctions chiefly only in so far as they are able to mobilize public opinion behind their decisions. Implementation gained great head-way during the nineteenth century, particularly during the latter half. It has already been mentioned how some treaties, like those in regard to slavery,[3] fisheries,[4] liquor, and arms[5] were implemented by the provision for surveillance and enforcement by the naval vessels of the parties concerned. This is one type of implementation: the organization of international "police" agencies to look after the direct enforcement of treaty terms, and the prevention or handling of infractions on the spot.

Of another type have been the bureaux and commissions established under many treaties to coordinate and supervise the activities provided for by treaty. These boards and commissions have been exceedingly numerous,[6] among them being the Danube and various

[2] See pp. 118–155.
[3] See p. 184.
[4] See p. 189.
[5] See pp. 192–193.
[6] See Potter, *op. cit*, Chap. XVII.

river commissions, slavery and liquor bureaux under the Brussels Act of 1890, Institute of Agriculture at Rome, Postal Union office at Berne and many others. The functions of these various bodies have been mainly to centralize the collection, distribution and exchange of information and to prepare the agenda for periodic conferences.[7] Certain ones, like the Danube commission, have had large administrative powers and extensive authority to deal with cases of treaty violation, and in the main, these implementing bodies have added considerable in the way of a sanction to the treaties with which they were concerned—they might be unable to act directly against a violator, but they could report violations and call the attention of the signatories involved to what had transpired. They tended to focus public opinion and served as a rallying point for any action which might be taken. Any treaty whose provisions were put under the care of an international commission or bureau was thereby implemented, and the sanction of public opinion and publicity was linked closely to the treaty provisions.

Since the World War, implementation has entered upon a new stage. Not only has its use been more extensive but it has been of a stronger character in many instances where it has been put into effect. For a larger number of these post-war treaties, the Permanent Court of International Justice has been named as the implementing body.[8] To it, by unilateral application, and according to compulsory jurisdiction, go many questions arising out of mandates, minorities, commerce, frontiers, customs, opium, prohibition of exports and imports, counterfeit currency, nationality, etc.

Many questions arising out of treaties which do not go before the Permanent Court are referred to the League of Nations[9] and its affiliated and subsidiary organizations. Of these latter, perhaps the Mandates Commission is one of the most outstanding. According to the terms of the mandates, each mandatory is required to make an annual report to the commission[10] which has rather wide powers as to investigation and the receiving of petitions.[11] Of coercive authority,

[7] See Potter, *ibid.*

[8] *Ten Years of World Cooperation*, published 1930 by the Secretariat of the League of Nations, 142. Also, Fachiri, *The Permanent Court of Int. Justice.* Approximately 20,000 bi-lateral relationships for reference to the Permanent Court of treaty questions have come into existence since 1920.

[9] See p. 124. The International Labor Office serves as the "implementing" body for most post-war labor conventions. See Buell, *op. cit.*, 160–162.

[10] E. g. Mandate for Syria, LeFur and Chklaver, *op. cit.*, 613, article 17.

[11] *Ten Years of World Cooperation, op. cit.*

the mandates commission has none, but the very fact that mandatories must give an account of their administration and that any failure or mistake on their part will be fully aired in Geneva where all the world may learn of any delinquency, serves as a sanction for the carrying out of the mandates agreements. If the mandatories were not required to make reports or to explain their actions at Geneva, if by treaty they had merely accepted certain duties with no means provided as a check upon their behavior, the world would have great difficulty in coming to any conclusion as to how matters were being operated. As it is, the mandates commission is the agency by which public opinion can be brought to bear upon a mandatory state. Implementation by a committee, commission or bureau is the bridge between public opinion as a sanction, and its applicability to any given treaty or international agreement.

In 1919, the French desired to implement the disarmament provisions of the Covenant by an international committee with wide supervisory powers,[12] but the proposal was rejected, and Article 9, providing merely for an advisory commission, was adopted. Since that date, the United States and Great Britain who so strongly opposed any sort of international control of military and naval forces and materials, appear to have swung around to the French viewpoint, and part VI of the Draft Disarmament Treaty, drawn up by the Preparatory Commission which concluded its work 9 December, 1930, provides for a permanent disarmament commission which is to have wider powers than the present Mandates Commission.[13] This committee is to meet annually and report annually to the Council of the League, to gather and disseminate information on world armaments and to supervise the enforcement of the treaty. Any state desiring to suspend the convention must explain the situation to the permament commission which also is to receive complaints of violation. These latter are to be investigated by the commission, and reported to the Council, whereupon the signatories are to advise and consult together upon what is to be done. If the Disarmament Treaty does go into effect at some future time, with a permament commission established as in the draft, it will be an example of a most heavily implemented treaty. Unlike the Washington Disarmament treaty of 1922[14] in which no international body was set up to oversee the exe-

[12] See p. 141.

[13] Documents of the Preparatory Commission, Series x, p. 250.

[14] DeMartens, *Nouv. Rec. Gén.*, 3 me Série, XIII, 195.

cution of its terms, the World Disarmament agreement will provide for a permament commission which always will be available for the reception of complaints and for the inspection of armaments. The significance from the point of view of sanctions of implementation of this sort is readily seen. A violator of the treaty would be confronted by the fact that a report of the violation would go before the commission, world opinion would be aroused, and the other parties would meet together to discuss what action would be taken—perhaps joint measures of coercion or force. The commission brings together all the forces and elements working for conformity; it focalizes public opinion and the action of the other signatories. The existence of such a body is thus of great importance, for the possibility of action on its part, action to be followed very likely by the mobilization of opinion and perhaps even of armies and navies, operates as a sanction for treaty observance. If a state has to explain its action before an international commission, if it has to face a hostile public opinion called into effective play by such a commission, it would naturally be more reluctant to commit an infraction than if it had to wait only for the disunited protests of other signatories not linked together by any machinery of cooperation and coordination.

In addition to international police agencies, and bureaux and commissions, there is another type of implementation which has achieved considerable notice, namely, that which bolsters treaties by means of a provision calling for consultation and collaboration among the signatories if violation occurs. These "consultative" pacts have been discussed previously but they deserve attention here because they constitute one of the chief forms of implementation, both in force and projected. The Four Power Pacific Pact of 1922 was definitely implemented by paragraph 2 of Article 1 and by Article 2 of the treaty[15] which arranged for the calling of a conference between the parties whenever a violation of the treaty conditions took place. Similar provisions for the Pact of Paris were suggested by France at the London naval conference of 1930[16] and were pledged by Norman Davis on behalf of the United States at Geneva in May, 1933.[17] Instead of merely renouncing "war as an instrument of national policy," the signatories, by an additional consultative treaty, would transform a purely negative agreement into a positive one. They

[15] DeMartens, *Nouv. Rec.*, 3 me Série, XII. 832.
[16] See p. 135.
[17] See p. 137.

would agree at least to confer among themselves and, if a violator persisted in his course, probably would take some steps to force him into submission. Just what would happen is of course all theoretical and purely speculative; if a cataclysm like that of 1914 should re-occur, it might be impossible to bring about the agreed-to consultation parley and the whole pact would be nullified. The sanction behind the consultative pact itself would have to rest in public opinion and a sense of moral as well as legal obligation. But granted that the consultative treaty may lack a strong sanction in itself, it would yet furnish a real sanction for the renunciation of war treaty. The strong possibility that the other contractants would confer and very likely adopt joint measures of coercion would constitute a genuine threat for a state considering infringement. A nation going to war, however, would maintain that it was not violating the treaty and that it was engaged in a war of self-defense. The whole intricate problem of "aggressive" and "defensive" warfare[18] would have to be considered by the signatories in conference, but the fact that they were due to meet, and some "community review" of the situation was to take place, would operate as a deterrent upon any state considering individual resort to armed conflict.

A consultative agreement to implement the Pact of Paris has been eagerly desired by those who would like to see the United States linked in some manner to the sanctions of the League. The uncertainty as to the position of the United States in case the Covenant were violated has been a stumbling block in the way of organizing coercive measures among the League members,[19] and it is hoped that if America agrees to consult when the infringement of the Pact of Paris occurs, (such an infringement probably being a violation of the Covenant also) that it will at least not insist upon its time-honored "neutral rights" and will allow "sanction" measures to be applied without opposition on its part. Such a consultative agreement would in a manner tie the United States to Article 11 of the Covenant[20] which makes of the Council an international investigating and consulting body if a threat of war emerges in any part of the world.

A major plank in the platform of the advocates of "security" before disarmament has been the implementation of the Covenant by ad-

[18] See Eagleton, "The Attempt to Define Aggression," International Conciliation, November, 1930.

[19] See pp. 135–137.

[20] D. H. Miller, *The Pact of Paris*, 133–134.

ditional pacts of non-aggression and guarantee. The effort has been to furnish further "security" for states who regard the Covenant protection as insufficient. Such agreements of implementation have been the 1923 draft treaty of mutual assistance,[21] the Geneva Protocol,[22] the Locarno treaties of 1925,[23] and the General Act of 1928.[24] These were designed to strengthen the provisions of the Covenant and to make possible a feeling of greater security by assuring some form of outside aid and cooperation for an attacked state. The Financial Aid Pact of 1930[25] was another such implementing agreement. Under the stipulations of the convention, ratified signatures representing a combined guarantee of a loan service of $9,750,000 are required as the minimum for it to go into effect. Only when these signatures have been ratified can the Council immediately guarantee a victim of aggression a loan totaling more than $140,000,000[26]—provided, however, that it is possible to distinguish the victim. Though the "guarantee loan" may never be used and though it may never be possible to determine the deserving beneficiary in case of a crisis, the existence of such a pledge probably brings a sense of some security to certain nations, particularly to the smaller, weaker ones.

Implementation of treaties thus may take several forms: it may be by direct international enforcing agencies like the warships under the fishing, liquor, and arms conventions; it may be by the establishment of international organizations like the League of Nations and the Permanent Court of International Justice; it may be by less influential international bodies like the boards, bureaux and commissions of the various copyright, agriculture, postal, etc. conventions;[27] or it may be by supplementary pacts and agreements calling for mutual conference, collaboration and aid in the event of violation. All of these methods are part of the growing tendency toward "community action," toward reliance upon outside, international participation in the enforcement of treaties. Treaty obligations are not longer being left almost entirely to the individual signatories to perform in isolated

[21] Report of the Temporary Mixed Comm. for the Reduction of Armaments, A35, 361–366.

[22] L. of N. *Off. Jour.*, Fifth Assembly, 29, 352. D. H. Miller, "The Geneva Protocol."

[23] DeMartens, *Nouv. Rec. Gén.*, 3 me Série, XVI, 7.

[24] L. of N., Monthly Summary, VIII, 298; Politis, League Pub. IX, 1928, Disarmament, No. 3.

[25] League Document A. 70, 1930, IX.

[26] *Ibid.*

[27] See pp. 197–198.

fashion; instead, the need has been felt for group activity and concerted policy—the increasing interdependence of states makes treaty violation no longer a matter of individual concern only. The whole community is affected, and implementation of treaties is a means by which community or group pressure is being put behind the obligations of a treaty. This implementation adds enormously to the strength of treaty sanctions: violators of the arms convention of 1919, for example, meet with the activity of the war vessels; violators of many post-war treaties are faced by League or World Court action, with all that that implies in the way of publicity and adverse opinion; violators of certain conventions establishing an international supervisory bureau face public exposition of their delinquencies; violators of a treaty implemented by a consultative pact face the threat of world-wide hostile opinion and possible concerted military or naval action. So far, the chief result of implementation has been to make possible the more effective use of public opinion as a sanction by providing a mechanism whereby public opinion can be rallied and made to manifest itself. If the machinery of international settlement and regulation becomes more highly developed and is endowed with greater powers, implementation of treaties in time may mean actual military and naval force behind the provisions of a treaty, in addition to unfavorable public opinion. For the present, actual measures of international coercion are only in the background, and if consultative pacts and Article 16 of the Covenant are ever put to a test, it remains to be seen how much they imply in the way of armed international cooperation.

## CHAPTER VI

## HOW DESIRABLE ARE SANCTIONS?

From this outline of the various types and modes of sanctioning treaties, certain salient points emerge which seem to merit particular attention. First of all, except for the sanction involving the loss of benefits, advantages and privileges under a treaty, none of the sanctions is automatic in character; they all rely upon the willingness of certain very human agencies to cooperate in making the sanction effective. This is true whether it is a matter of giving hostages, of third party guarantee, or of joint collaboration to punish a violator as in Article 16 of the League Covenant. There is always the "sanction for sanctions" problem, the question of forcing a ruler or state to give up or give back hostages as promised, to intervene as agreed to in the case of a guarantee treaty, or to furnish the troops and supplies required as in Article 16. Practically all of the sanctions discussed, with the single exception already noted, depend for their efficacy upon the sense of responsibility of the parties which have agreed to perform certain functions.

This fact leads to the second point, namely, that this sense of responsibility on the part of states seems to be increasing and must increase if the world's business is to go on. No longer, as in the medieval, and 16th to 18th century periods when states were not as commercially and financially interdependent as they are now, can nations afford to be irresponsible or negligent concerning their obligations. It is the old story of a community (the world community this time) developing from isolated, relatively independent units, into a complex, intricate society whose fabric cannot be torn in one spot without the whole being affected. Stability, order and law become more necessary as the world "shrinks," and treaty sanctions, as the means of inducing states to keep their agreements and which thus help to bring about the sense of security demanded by international commerce, are becoming of increasing significance and importance. That this sense of responsibility on the part of states appears to be growing seems apparent after the discussion on the topic of implementation: it has become apparent that even the United States feels responsibility for world peace to the extent of collaborating with other signatories in the event of a breach in the Pact of Paris. The willingness of

states to take on duties in implementing and guaranteeing certain treaties indicates a developing sense of responsibility for world order.

A third point is that with the growth of world commerce and intercourse, more and more treaties are being made to cover the problems and questions arising from the new situations created by the complexity and inter-relation of modern activities in all countries. Such agreements as the Pan-American convention for the Regulation of Automotive Traffic[1] and the International Load Line convention,[2] and such a conference as that summoned on the Unification of Buoyage and Lighting of Coasts,[3] in addition to the many conventions previously cited pertaining to navigation, obscene publications, air traffic, radio and telegraph, protection of artistic and literary works, etc.[4] testify to the wide-spread use of international conventions as the mode for regulating the ever-augmenting business of international life and affairs.

More and more of the rules governing international conduct are being drawn up in convention or treaty form so that very likely, as the Historical jurists maintain, international law, like municipal law, beginning as unwritten custom, is developing statutes, courts and administrative agencies of its own. International law is becoming more like municipal law, with treaties assuming the aspect of statutes, and with the collectivity of states serving as a "legislative superior" for the world community. The analogy is by no means perfect, but it appears true enough to be of significance, especially for the subject of sanctions. For with international law developing as treaty law, it becomes possible to insert definite penalties into the law, something that was not possible as long as it existed as mere unenacted custom. If the process continues it may mean that in time treaty sanctions will become the most important sanctions of the law, the older sanctions of fear of war, public opinion, etc. becoming of relatively less significance, and it may mean too that jurists of the Analytical school will be more ready to admit the "legal" nature of international law once it has taken on the character of written rules enforced by precise sanctions.

Here a fourth point enters for consideration. If the law continues to be made up more and more in treaty form, those making the law

[1] Treaty Information Bulletin, Dept. of State, No. 13, October, 1930.
[2] Press Releases, Dept. of State, 6 September, 1930.
[3] Treaty Information Bulletin, *supra*.
[4] See pp. 254–268.

will probably have to choose between two types of sanction, either the automatic variety like that in Hague Convention II (1907) or the international force sanction where the states of the world pool their resources for common enforcement of treaty terms. The religious and moral sanction and the use of hostages are obsolete; the League of Nations has taken the place of the old-fashioned third party guarantee, and the pledging of territory and goods and the authorization of "self-help" are becoming of less importance. The tendency is toward implementation in the form of joint measures of coercion as in Article 16 of the Covenant, toward restricting "self-help" and individual enforcement, and toward the placing of force at the service of community law and directed into legal channels by a community court and an agency like the League of Nations or a world conference summoned in case of a violation of the Pact of Paris. This may seem a bit visionary considering the present state of world organization, but the tendency is there. Whether it develops further or not is of course another matter. Some sort of international agency is essential to make genuinely effective any sanction of nullity,[5] any threat of joint application of force. One needs only to consider the threat of force contained in the Treaty of Westphalia when no central international organization was in existence to coordinate its application and to compare it with Article 16 of the Covenant to note the direction in which the matter of sanctions is moving. The effort to lift the question of treaty enforcement out of the hands of the individual parties concerned is visible all along—the old third party guarantee represents such an attempt to place responsibility upon an impartial body. The question exists today as to whether this effort is succeeding as it should, whether the question of treaty violation is being left to irresponsible, decidedly partial hands or whether it is being given over to community regulation and control. The Permanent Court, the League of Nations, the numerous international administrative agencies and the references in modern treaties of questions of violation and infringement to such bodies indicate that the effort has met with some success. Again, one cannot be too sanguine as to the eventual outcome but the drift is to be noted.

Fifthly, although fear of force seems the most important sanction of international law and although many of the special treaty sanctions previously discussed rely ultimately upon the fear of force for

[5] See p. 179.

their effectiveness, it should be recognized that the standard of justice enters strongly, perhaps more today than ever, as a treaty sanction. Just as within a state a good law is heavily sanctioned by the fact that the mass of the people recognize it as good and are not held from contravening it simply because it may bristle with penalties, so too in the international sphere, states tend to abide by treaties regulating international affairs because they recognize that those treaties are good, that they are necessary, and that to violate them would disrupt international trade and intercourse with probably unhappy repercussions upon the violator itself. "Good" treaties, those for the welfare of all parties, do not require strong sanctions, the mere knowledge on the part of all concerned that the treaty is mutually beneficial being sufficient in the main to induce conformity. Thus, almost paradoxically, as the importance of treaties and the necessity of observing them grow, the need for treaty sanctions of a penal order may decrease for the bulk of modern conventions.[6] For treaties of peace, where one of the parties is usually inclined to violate the agreement as soon as he can, strong sanctions are required. Here enters in the danger of establishing an "inequitable" status quo by means of powerful santions, a danger which leads many to distrust the development of strong treaty sanctions. The problem of the prevention of wars which are likely to result in treaties to the chief advantage of only one party is thus linked with the question of sanctions. If there are no one-sided peace treaties, then there will be small chance for powerful sanctions operating only unilaterally. And the prevention of war is tied to the development of strong international agencies and bodies for the settlement of disputes likely to lead to conflict, and for the taking of measures against states which resort to arms counter to their agreements. These international agencies thus are necessary for the effective application of treaty sanctions and at the same time for the prevention of wars with their resultant treaties of peace, so that the questions of war prevention, treaty sanctions and the creation of international governmental machinery are all inextricably involved together.

But even though a large number of current treaties relating to the affairs of international life do not seem to require strong sanctions the threat of force as a sanction seems necessary, at least in the background, as the ultimate weapon of the community against a

[6] This refers to sanctions for state conduct of course. Sanctions for individual conduct under modern conventions are increasing in importance. See pp. 194–195.

recalcitrant member. The problem of the organization of that force as a sanction remains; the steps toward implementation and collaboration already suggested are only a beginning. Much legal ground has yet to be cleared. New problems concerning neutrality, "public" and "private" war, and the status of states applying economic measures short of war have arisen in connection with the possible international application of measures of coercion. Much more time and experience will be needed before these questions can be brought nearer to a settlement. Meanwhile, during a transition period, when legal lines cannot be clearly drawn and when the full implications of Article 16 and the Pact of Paris remain indistinct and vague, only conjecture can be made as to what is coming. What the treaty sanctions of the past and present have been and are, has been shown. Several are now only of historical interest, others have proved ineffective. The tendency, however, has been toward international control of the use of force and of the determination when violation of a treaty has occurred.

The force at the disposal of the international community for sanction purposes is enormous but because it has not been subject to centralized, responsible authority but to the policies of many states varying in strength, its effectiveness as a sanction of the law and of treaties has depended upon the sense of legal responsibility of the individual nations. In a crude and hap-hazard manner force has been used and exists today as the last and extreme sanction for law and treaty violation. The non-force sanctions operating in the same unreliable fashion possess a severity that is not great except in unusual circumstances and their value as sanctions is accordingly much less. They frequently are merely preliminary to the employment of means of force which remains the final sanction.

Article 16 of the League of Nations Covenant represents an effort to put force at the service of the community and to restrict its use for private, that is, national aims. The system as yet has never really been put to a test and amendments and interpretations have watered down the obligations under the article. Not until the nations are willing to place their military forces at the disposal of a world international staff will a solution of the problem of organizing force in support of law be achieved. To realize how far distant that solution is one needs only to picture the United States Senate confronted by a treaty transferring control of the army and navy to an international commission or to visualize in action a constitutional convention called to amend the clauses making the President commander-in-chief of

the army and navy.[7] Such a final settlement is no doubt far distant, but gradually some improvement on present irresponsibility may be made by agreements to curb individual employment of force[8] even if the combined use of military powers, controlled and directed by joint organization, is remote.

A world police force under commanders responsible solely to an international body is the only final solution, however, for no matter how much states may consent to limit the exercise of their jurisdiction over the forces at their command, there is always the problem of the treaty-breaking state. Who is to coerce the violator? It would still be "self-help" so notoriously insufficient and unreliable. An ambitious scheme like that of Article 16 depends for its success upon the willingness of each member to furnish the forces and arms promised. A state may refuse to comply with the Council's request and a "sanction for sanctions" would be necessary. "Quis custodiet custodes?" Legal order may be piled on legal order with no assurance that any will be obeyed. As long as states continue to have the final word as to the direction of their fleets and regiments, anarchical "self-help" will still be present, which means that force in the service of the law determined by agencies of the international community is not in the realm of very immediate probabilities.

And it may not be so unfortunate that this is so. International organization comparable to that inside the state is far in arrears, and is not yet adapted or ready in a world where nationality and race feeling still play enormous parts, to assume the duties of chief of police. If world unity ever does come about it may not be accomplished by a federation of nation states on whose behalf an international army would function in curbing states as individual criminal units. Penalizing whole peoples and waging war against a violator state in the aggregate raise enormous difficulties. There might be a giant unitary state with a police force operating directly upon individuals instead of states. In such a case there would be no international law to possess sanctions, only a sort of world constitutional law. International law may be only a passing phase, suitable for a particular condition of affairs, and capable of having only very imperfect sanctions. If a situation develops where more perfect sanctions are possible, international law as we know it may have outlived its usefulness and function, and the sanctions would belong to a kind

[7] Article II, Sec. 2, 1.

[8] E.G. *Bryan Treaties,* Pact of Paris, conciliation and arbitration conventions.

of law very different from what goes by the name of law of nations today.

The more one goes into the topic of treaty sanctions at present, however, the more is he puzzled concerning their value and usefulness. It is true that treaty observance is important but is it not also true, that in a world where nationalism is rampant, only those treaties which states consider to be to their advantage will be kept regardless of special sanctions, and that where treaties stand in the way of what Professor Schuman has termed the "politics of power,"[9] no amount of implementation or coercion on paper will deter a violator? No state thinks of infringing upon the provisions of the International Postal Convention, while the whole League Covenant, the Nine Power Treaty and the Pact of Paris did not stop Japan in Manchuria. In other words, is it not the nature of the treaty rather than the nature of the sanctions which determine compliance? Such a question goes back to the international standard of justice discussed earlier as a sanction, and it seems safe to say that only in so far as all signatory states firmly believe a treaty to be a "good" one, a "just" one or a "useful" one is it really sanctioned, and that it is of small avail to attempt to pin sanctions upon treaties which are apt to run athwart the national policies of powerful states.

But, it may be objected, is not one thereby admitting that sanctions can only be effective where they are not essential, that is, for non-controversial agreements and that it is hopeless to plan for them where they are needed most, namely, for great political or constitutional treaties like the Covenant and the Pact of Paris? Such an objector might argue that in the domestic sphere, powerful sanctions, police, militia, etc., had been, on the whole, effective in enforcing laws and in combating criminals, and that all the international community needs to do is to evolve strong sanctions to coerce nationalistically minded states into obedience. Upholders of this view have great faith in the efficacy of collective action and would like to see Article 16 reinvigorated with the United States pledged to help with embargoes and boycotts under the Pact of Paris. Such persons, and this is the official French thesis of security, argue that the trouble with Article 16 to date has been the uncertainty of its application, and that if only Japan had *known* that drastic sanctions would have been surely applied, she might never have sent the regiments into

[9] *International Politics, op. cit., passim.*

Manchuria. The more deadly and certain the sanctions the less the likelihood of their actual use being required. Even controversial political treaties, those likely to impede a great state in the pursuit of its policies, could be sanctioned in this way, and the peace of the world would be assured, no state daring to run the risk of encountering international police action. The argument is plausible, and its believers assert that their way is the true way to an orderly international society: peace must be enforced! "All the logic of political science"[10] seems to support this (the French) outlook. It calls for organization of the forces of the world, of pooling them on behalf of society, and of having them ready to pounce upon a violator. The domestic community is so organized, logically, then, why not the world?

For anyone interested in promoting international peace and in the upbuilding of international government, it seems almost like heresy to the cause to express grave doubts concerning the feasibility of coercive or force sanctions when these constitute one of the chief pillars in the edifice of security, disarmament and peace, so frequently sketched and planned for since 1919. It seems apparent that certain treaty sanctions such as those of the automatic kind or of the guarantee sort, of which latter the League's position in regard to the minorities treaties is an example, are useful and beneficial. Certain treaty infractions, in these ways, may be prevented, and violator states called to account. There is no doubt too that sanctions applying to individuals are necessary and effective, and even consultation is helpful perhaps, not so much as a sanction, but more as a concession to French fears, in order to make possible some reduction in armaments. When it comes to more drastic measures, however, a line needs to be drawn. Is this mere Anglo-Saxon timidity, so scorned by the French logicians? Is this merely muddled thinking, a result of not seeing the problem through? A negative answer is hopefully submitted. It is admitted that logically, if states are called to account by the League, if they automatically lose the benefits of a treaty or if they are confronted with a threat of consultation among the signatories to a pact further steps of a coercive nature are in order. *Logically*, yes. The trouble is, however, that it is too logical for an illogical world of states. The difficulty lies not in the reasoning—it is faultless—but in what is being reasoned about, to wit, the international community.

[10] Pitman Potter in review of C. H. Webster's "The League of Nations," *Am. Pol. Sci. Rev.*, June, 1933.

The sanctions-security protagonists scheme and plan as if the world were already a community of some 65 "persons" who could be coerced and punished like private individuals, but the whole notion has an air of unreality about it. There are 65 "states," but they are artificial persons, made up of thousands or millions of actual people who have lines of interest and activity not always in accord with the policies of those dominant in their nation. These states, further, are an odd assortment of all sizes and kinds; some are dependent upon others and they cannot all be pigeon-holed into neat compartments of "fully sovereign," "protectorate," or "suzerainty." The lines blur. As Harold Laski has said, "It's an untidy world and one can't always have tidy theories." The strong sanctions school appear to envisage a world of 65 units which can be treated or coerced like so many single organisms, but the fundamental defect in their theory is the obvious but often forgotten fact that states are *not* persons. They cannot be treated as criminal units in the same fashion as a private individual can be. Automatic sanctions, consultation and League guarantee sanctions bear upon the "state" as a whole only in theory: actually they influence persons who are in control of the government and make their policies conform, or else the loss of benefits sanction for example, affects only certain elements in the population. Treaty sanctions of this sort are relatively effective, in that they maintain treaty obligations and penalize violations of treaties by affecting the mass only indirectly through the few. Whole states are not penalized in any true sense. What happens, is that those governing the states see to it that a treaty is upheld or are the ones who are influenced by the sanction when infringement is contemplated. A nation, true, may lose territory or goods as a result of a penalty for violation but the rank and file of citizenry lose nothing, strictly speaking. Their own lives and their possession of property go on as before, unless they happen to be among the few concerned in international affairs and investments.

There is no intention of reviving here another Nominalist-Realist controversy: states, as legal fictions do exist, but sanctions operate upon states through human beings who are capable of being influenced and who are at the helm. As pointed out in the beginning, sanctions contain a large psychological element, and treaty sanctions labelled as sanctions affecting the state as a whole do concern the entire national legally, but ordinarily only a fraction of the population in actuality. Therefore, when it comes to force sanctions something

different is encountered from a penalty which touches only a relative few. This is not to say that national spirit may not be aroused by any sanction affecting the state; it is to say, that coercive sanctions far more directly concern the lives and habits of all ordinary mortals than any of the others. Between a state's losing a pledged fortress or the right to construct a canal or the diplomatic recognition of some new territory, and a state's being confronted with an international armada, there is obviously a profound difference. Legal fictions aside, sanctions are of concern to persons; legally, the entire state is involved in any case, but concretely only a relative handful of persons is concerned. This is to say, therefore, that the whole subject of treaty sanctions except where those specifically dealing with private persons is concerned, deals with an unreal world of legal fictions unless it is recognized that sanctions are dynamic factors coming into contact with alive human beings, not inert legalisms. Treaties are legal documents, sanctions are contained in legal phrases, and states, as legal entities, contract with one another and agree to certain penalties, but these latter are effective only in so far as they hit living beings, not fictional entities. States of the world are not neat pellets to be hurtled against one another; they are masses of living creatures, and when sanctions are of the variety which reach only those in control who act in the name of the legal entity involved, their employment raises no insurmountable difficulties because of the relatively small number of persons involved. However, when they call for the use of mass against mass—the forces of whole states against the forces of other states—the simple picture of the sanction-security school which shows 64 units vs. 1, is not accurate. More truly it would be a billion and a half people vs. say, 100 millions. One hundred or 60 millions persons, though legally united as one group are not the same as one individual. How can and why should they be coerced in the same fashion? The United States Supreme Court was faced with this same question in the famous case of *Virginia* vs. *West Virginia*.[11] Legally, the unit known as West Virginia was indebted to Virginia, but how could it be induced to comply? States may lose water rights and things of that sort—the bulk of the population does not need to be affected—but practically, coercive measures against a whole community raise enormous problems which happily for the Supreme Court in the case cited did not have to be answered.

[11] 246 U. S. 565.

Perhaps force sanctions *can* be used against whole nations, even if it be recognized that the situation is entirely different from punishing an individual person, but the difficulties involved constitute a grave objection to schemes envisaging this type of action. Within the nation to be punished, are the thousands, perhaps millions, who have nothing to do with state policy, to be starved, slaughtered, and beaten, because the few in the government, who represent the state, may have directed that state into illegal channels? If the French are logical, let us be logical too, and scrutinize what collective sanctions really mean: they mean not the outlawing of a person or of a group responsible for their actions, but a whole people, only a portion of whom are responsible for guiding the craft of state. Let us be logical and go behind the legal fiction of the state and see a people as well as a government. These do not form a compact unity to be driven into subjection; they are separate persons with homes and families likely to be destroyed. Perhaps "to make the world safe for democracy" or to preserve the "peace of the community" and to "save civilization," wholesale action against an entire people may seem "essential" if these people all seem imbued with a fanatical, conquering spirit, but let it be recognized that sanctions against such a group mean war, that numerous "innocent" parties are concerned and that the situation is not as pretty and neat as the strong sanction advocates sometimes seem to imagine. Woodrow Wilson said that the United States was not fighting the German people but only their rulers, but in the effort to subdue the latter, the former were engulfed in common grief and suffering. Universal sanction forces, likewise, could not distinguish between rulers and ruled.

Some of the designers of international police plans, however, assert that the gruesome scene here pictured would not come to pass. Modern deadly machinery of war, they say, could be placed and concentrated in the hands of an international agency, all states being stripped of these potent weapons, and then no state would dare defy the authority of a League or an international body.[12] Submission would be achieved without loss of life and bloodshed. Such might be the case, but anyone conversant with the strength of national feelings, once aroused, and with the force of the drive for power among groups in various states, cannot be too sanguine as to these becoming supine before an international agency and in refusing to take a chance by

[12] David Davies, *The Problem of the Twentieth Century*, *passim*.

staking all upon developing the proper pitch of popular fervor at home to combat the "police." It is admitted, though, that given an international police force which had in its possession an overwhelming military, naval and air strength, rulers of states might be restrained from embarking on courses inimical to the order of the world. It is conceded too, that even if the police force had to be employed the ensuing war might be requisite for the peace of other nations.

The coercive sanctions proponents set up the peace of the world as their end-all and be-all; it is their absolute, their standard. With cogency, they argue that unless an attempt is made to restrain a nation through a threat of international police action, there is likely to be war or widespread use of force, and that even if force sanctions do lead to war involving whole peoples vs. whole peoples, conflict would be inevitable anyway since nations would resist attempts by any other states to dominate them. If whole peoples are likely to run amuck, creating havoc among their neighbors, is it not better to plan to threaten such would-be disturbers before they have the opportunity to ignite the tinder box, and would the application of force measures, if such were called into play, be any worse than the international warfare, which would probably ensue, if no attempts to threaten were made?

An answer to such reasoning is not easy, but the assault upon this fortress of logic may be directed at its foundation. The fundamental premise of the security logicians is that the peace of the world, namely, the status quo is something to be preserved at all costs and that the nation which violates it is the "criminal," the "aggressor." It is that premise which is questioned. Now the status quo, the present "peace," can be changed in two ways: by pacific means, peaceful revision, as discussed in Chapter I, or by force. If peaceful revision machinery *can* be developed, and some outlet or escape provided for the pressure in expanding countries, then force sanctions against a nation which rips up pledges might well be in order. Account would be taken by the revision procedure of the *needs* for change. The outlook, however, for such a revision process is dubious. Article 19 is in the Covenant to be sure, but to make it truly effective, the Assembly of the League would have to become a body far more akin to a true Parliament than it is today. Any strong tendency in that direction is not apparent. Under the stimulus of the Four Power Pact, more may be made of the article, but the prospect of its becoming any satisfactory Charter of Change is not bright. Given this uncertainty

as to the possibility of peaceful alteration, the only alternative states wishing to revise fundamental treaty situations is by force if a Germany attempts to snatch a Corridor, or a Japan a Manch in response to strong feelings among their peoples, who shall say such action is *wrong*, and that it merits the condemnation of the er world? Nationalist forces are held in temporary equilibrium by uous treaty bonds fixing a status quo, but if one of those forces bu the ties, is it "criminal?" Have we any true basis for judging, lacking any such standards, should we make elaborate police f schemes whose whole raison d'être is that there is an internati *right* to be maintained? Such an international standard of jus applying to crises where national and racial interests conflict is fortunately not clearly developed. In other words, there is no community of nations, no common ethic, no single measure for we ing antagonistic and opposed powers.

Is it *right* for six million white people in Australia to contr whole continent when they occupy but the fringe, and when o races are in "need" of land? Has Japan a *right* to expand? C says, "no," not at her expense, but is there any deep seated c munity feeling that a growing nation has not the *right* to incr its territory and wealth? What of America's own "Manifest Destir It may be unfortunate that no such ethical consensus is now in istence, but until we are surer of what is right and what is wr until we agree more fully upon a standard of judgment, the time setting up policemen seems not yet. Less drastic sanctions are n suited to a world of states which is still fumbling and groping way. The tests of aggression, the means suggested to date for de mining which state is right, and which is wrong and which m community aid and which does not, are not sufficiently convinc To brand a state as "criminal" because it violates a frontier treaty, is to pass superficial judgment without going into the un lying racial and political factors, and to enter into these at the pre time is to penetrate into an almost hopeless tangle of historic nati grievances and psychoses. The Lytton Commission admitted *both* the Chinese and Japanese had legitimate complaints aga one another in Manchuria in 1931. In such a snarl, was Japan a the 18th of September so definitely in the wrong as to warrant application of force against her? The failure of the League or United States to take more active steps in the Far East is attribut not only to weakness in the aggression and "resort to war" formu

but to deep-seated doubt as to whether Japan really was so very much a culprit after all. Would not other powers have acted in similar fashion under similar conditions? There are forces still strongly at work in the world which cannot be neatly balanced; the needs and desires of states still constitute imponderables for which no adequate scales of just measurement have been devised.

It is true that the existence of policemen helps to build up a sense of law and order, but originally before the policemen, there must be *some* consensus as to the kind and type of order desired. There must be agreement upon ends before a community capable of maintaining a police force can come into being. Looking at the veritable jungle land of world politics today, it does not seem either expedient or reasonable to set police forces operating until more ground is cleared, more thickets of national passion cut down, more chance to see what kind of system is going to emanate from present conditions.

This absence of an international standard of justice as regards the fundamental pattern of world society is one of the basic reasons, whether conscious or not, why states are so reluctant to subscribe to police force plans. The tests of aggression appear too superficial, and the dislike of obliging oneself to participate in action taken on behalf of causes of whose rightness one is not so very sure is too intense to permit much progress along the route of collective action. To urge states to join in such schemes, to get them to commit themselves to such proposals when there is no deeply rooted urge in that direction seems likely to lead only to disappointment and to worse confusion than ever when those states fail to perform or subscribe in a crisis. A police force implies the existence of a full-fledged community with well developed community instruments of government; to gear the present creaking, uncertain international governmental organization to a highly efficient police force, would be equivalent to hitching an old water-wheel to a giant turbine. The latter is too advanced for the former.

Further, in any true community, sanctions in the form of police action are not the most decisive factor in securing obedience. The latter is dependent upon a will for the community which all the police in the world cannot inculcate. Order and obedience rest upon a foundation far more solid than that of clubs and bayonets. If the only way individuals can be kept in line is by threat of punishment, the community is extinct. Similarly, internationally, states will keep the peace when they *want* to. The creation of that desire on their part

is far more important than the making of threats of punishment when it is not clear just why or when punishment is due. The desire for peace is dependent upon the kind of peace, and only time can tell what that will be. Sanctions are important *after* there is more of a community than exists among nations today; they are not the most essential ingredient in its composition. Sanctions were made not to run the community but to be run *by* it for community ends. Lacking the ends how are very potent sanctions possible?

The door is thus still left open for national use of force and war, without threat of community police action. Such a state of affairs may be unpleasant but it seems inevitable for the present. Adequate moral, ethical, and psychological bases for police action simply do not exist. Efforts of the League to prevent conflict, all the good work of international cooperation and collaboration should go on, of course, and mild sanctions, ones which do not necessitate too much searching into fundamentals, should be used to produce as much order as possible. In this way the growth of community feelings and sentiments may be fostered. Let us not jar this embryonic society of nations into bits by attaching police measures to it prematurely and before we know how these latter should be employed. Let the emphasis be upon conciliation and prevention of conflict rather than upon penalty for its outbreak. In time, when the nature of the type of world organization, whether federation of states, or a great constitutional state, or a giant U.S.S.R. or perhaps continued anarchy, toward which we are heading, becomes clearer, then international police measures will probably be needed. Rules for judging the merits of conflicting claims—race vs. race for example,—which today are not available may then be at hand. Force of some sort is of service for any community in order to keep the recalcitrant few in check, but an international police force today would be an anomaly, given no real community and no adequate means of judging who is recalcitrant and who is not.

There are other reasons for misgivings in regard to collective force measures but before continuing with these, a word should be said about "economic measures of coercion"—boycotts, embargoes, and the like. These latter are frequently suggested by persons, Americans, particularly, who think that military and naval sanctions are too drastic or are unnecessary, and that the same results could be achieved by more peaceful and less noxious means. Several objections occur. First, these measures are subject to the same criticism already men-

tioned, namely, that they operate against whole peoples and tend to drag millions of innocent parties into an affair not of their making. Secondly, is an embargo or a boycott designed to paralyse a nation's economic life, and tending ultimately perhaps, to starve a community into defeat, so much more "humane" than military steps would be? There is room for argument, but the line of difference is not so very apparent. Thirdly, economic and financial measures may subdue a weak nation quickly and may be of value for cases of that sort, but it should be recognized that they are hardly sufficient to bring a great nation to terms. Once an embargo or a boycott is applied, can one picture a major power giving way without a fight, without coming to a final showdown of force? All who favor economic sanctions should be prepared to follow them up by the ultimate arbiter, military strength. It is a delusion to think that a great state will recede in the face of economic action alone. All the partiotism and tenacity of a proud people would be called into play, once an embargo or a similar measure was placed against it. Does anyone imagine that an American embargo or boycott against Japan in the winter of 1933 would have done anything but set loose all the fires of nationalism from one end of the islands to the other, and that even if the odds looked hopeless, national pride would have allowed surrender without a death struggle? Let those who have faith in economic means realize the consequences of the measures which they esteem.

These considerations lead to a criticism of the type of sanctions provided for in Article 16 and in the proposed "economic sanctions" to the Pact of Paris. The theory is that national forces and national economic resources would be used against an aggressor in a kind of international "police" action. The national contingents would be sworn in under the banner of internationalism. The view is that action taken in such cases would not be "war" in the old sense but "police" measures by the community, the word "police" implying something impersonal, something operating on behalf of a community cause. Could much semblance of "police" action be achieved, however, as long as national forces were doing the job? Policing of this sort would be like asking the Jones family to waylay the Smith family which had been declared in need of punishment or restraint by a Community Council lacking a separate force of its own. Would the Smith family be inclined to view the steps taken by the Jones' group as "impersonal?" Would lt not look like a case of family spite, with private Smith-Jones animosities coming into play? Likewise, international police

forces composed of national groups would be rather difficult to regard as community agents. To be concrete: imagine the Council of the League declaring that sanctions should be applied against the United States. The only immediate available "police" forces of practical use would be the British and Japanese navies. In American eyes the United States, fighting, of course, a just war of self defense, would be engaged in combat with Britain and Japan. It would be not only on the ground that they are difficult to put into operation—(the sanction for sanctions problem again) but also on the basis that even if they are successfully inaugurated, their use may breed greater international hatreds than ever before. The mere fact that the national troops might be fighting for the community would not lessen the fact that they still were representatives of individual parts of the community and were engaged in a combat of nationalities, whatever the theories of the situation. The solution for the problem from the viewpoint of collective sanctions is obviously to create a true international police force, one divorced from nationalist origins and under the sole control of an international authority. The action of such a body would be truly impersonal, and no nation vs. nation feelings would be necessarily aroused. The Article 16 kind of sanctions, however, which stipulates that member states shall supply their own forces on call seems to be as far as states are willing to go at present toward creating a community police agency, and the dilemma is that the only way of overcoming the weaknesses inherent in the Article 16 plan is by establishing a police system deemed much too drastic for the present.

Boycotts, embargoes, financial sanctions and the military and naval provisions of Article 16 are thus all subject to criticism from various angles: they are insufficient in themselves, they tend, if put into effect, to stimulate nationalistic feelings, they seek to deal with whole states as if they were single persons, and they imply what does not exist, namely, a community fundamentally agreed upon common ends and on international organization capable of naming the "aggressor," the "criminal," against whom the police force is to be used.

At present, there is a true international community for some purposes: for post-office, weights and measures, extradition, radio, transportation and the like. All nations see the need of collaborating in such matters, and are equally and jointly interested in maintaining international agencies to promote these interests. Sanctions for conventions establishing international arrangements of this sort are feasible, and paradoxically, as previously stated, rather unnecessary

in so far as all participants see advantages for themselves in obedience to the rules set up. On other questions, a real community is more difficult to discover. As long as the currents of nationalism and race feeling run as strongly as they do today, it can hardly be said that more than a beginning has been made in the creation of a world order. Nationalism of the virulent sort visible in Manchuria, in Germany, and in the erection of high tariffs, immigration walls, and the like, is the very negation of the community. The codification conference at the Hague in 1930 showed the absence of universal feeling on such relatively innocuous topics as territorial waters and responsibility of states. Vast areas of international relations remain uncovered by the law. As long as groups within states, supported by the whole complicated apparatus of nationalism, vie with groups in other states for power and prestige, as long as Germany feels as she does about the Corridor, as long as South Americans distrust "Dollar Diplomacy," as long as there is an Italia Irredenta, as long as Britain anxiously makes reservations to international agreements about "imperial defense," as long as white Australia fears the Yellow Peril, how *can* there be a community in any real sense?

Great international conventions on many topics from opium to white slavery, the international public Unions, the World Court, and the League, all demonstrate that there is *some* community, but political questions, national rivalries and fears, dominate the scene all too plainly. Given such a situation, can any one state be deemed an "aggressor," when the whole system or lack of system today breeds divergent and conflicting interests which are bound to cross, with neither party to a dispute being entirely blameless or entirely at fault? An international police force would have to have a united world behind it, but that united world does not exist to the extent required.

The present state system may not be stable and lasting enough to warrant the erection of an elaborate coercive mechanism upon it, and as long as it does endure, it fosters such antagonisms that agreement for joint use of force seems well nigh impossible to attain. Conflicting forces are at work in the world: nationalism vs. nationalism prevents an orderly unified society while at the same time, other agencies are operating, not the least of them, Communism, to build up a community in a different fashion. More of the rules of the game, more ways of knowing aggressors when we see them, must come first. As long as there is anarchy, sheer power vs. power, in so many spheres

of international action, of what avail to put in a policeman to catch a culprit, when all nations are "culprits" in one way or another. Mere formal violation of a treaty, or an automatic test, can hardly be called a trustworthy guide. Bases for judgment should have the test of longer experience and should rest on more secure and convincing foundations.

Some objections to collective sanctions, boycotts, and embargoes, have been made because these would involve violations of the laws of neutrality.[13] This argument seems not so important from a long run view. New law is often made by violating old, and the laws of neutrality are not so sacred that they could not be violated, if such infringement led to a better state of affairs. Laws are the servants, as well as the rulers of men, and can be changed, if necessary.

From the point of view of world order the stand against an international police force and collective sanctions may seem like an exceedingly hopeless and pessimistic one. Does it mean as J. B. Moore claims[14] that we should give up entirely plans for collective action, and stay at home, each nation to itself? Such an extreme position hardly seems necessary. To a large extent every nation is involved in the affairs of every other nation; there are many successful examples of international collaboration; isolation is impossible in practise. Treaties should be kept, and sanctions devised to help maintain obedience are all to the good—provided they do not attempt the impossible, that is, to maintain order where there is no true order and to set up a régime of policing before we know how or what to police.

The kinds and types of sanctions which seem of most service are therefore:

1) Sanctions in treaties affecting private citizens directly. This is analogous to domestic legislation and may be the only kind of treaty sanction of the future.

2) The automatic sanction. These operate easily, require no elaborate mechanism and are useful in so far as they promote order without implying a reorganization of the state system.

3) Collective sanctions which call for consultation only. Consultation is of practical service as a concession to security theorists in order to promote disarmament and international cooperation. Pledges

[13] See Hyde, C. C. and Wehle, L. B. "The Boycott in Foreign Affairs," *A.J.I.L.*, XXVII, 1–10.

[14] "An Appeal to Reason," *Foreign Affairs*, July, 1933.

of collective sanctions beyond consultation however, are not recommended. After consultation, states may desire to exert joint pressure but to be pledged to do so in advance makes for disillusionment and confusion if there is default on complying with the pledge later, and for other difficulties arising out of treating whole states as "criminals," as previously discussed. Informal consultation and flexibility seem preferable to rigid "aggression" formulae and definite sanction commitments in the fluid state of world relations. Until there are more adequate means for treaty revision, until it is clearer what kind of a society is going to evolve, until spheres of anarchy give way to spheres of law and until a community of peoples whether in states or in some other form has a chance to develop common interests and greater mutual trust more elaborate enforcement machinery than is now available should not be expected or attempted. The realities of the world today, whatever the dictates of logic, force one to this conclusion.

Sanctions in domestic law operate against individual persons, are heavily implemented with governmental agencies ready to alter, interpret, administer and enforce the law. Back of all this, is a genuine community feeling which supports the application of penalties and also makes them unnecessary for the bulk of the population except in cases of civil war and revolution when anarchy must be reckoned with. Treaty sanctions are in another realm. They are attached to legal documents between states, they operate against artificial entities by affecting the persons ruling those entities; the community for a treaty sanctions is a limited one, both as to the number of units (65) and the scope of communal feelings between those units. This community is not so stable, is not so orderly, as is the national one. The rôle of treaty sanctions, in so far as they affect states as a whole, is a difficult one: they are designed to keep treaties inviolable, when it is apparent that some treaties do not need such sanctioning, so obvious are their benefits, and when other treaties cannot be and perhaps "ought" not to be maintained intact, there being no common agreement on the "ought." Until the forces of nationalism are more subdued, and until states cease somewhat to exert pressure upon one another, if not by outward force, then more indirectly by diplomacy, the treaty structure will be so uncertain and so insecure, that sanctions for it of a very elaborate nature are scarcely worth while. Order is desirable and sanctions tend to promote it but order is impossible to expect, even were there an array of policemen, while the community is still so much in the making.

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